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Criminal Law: Cases and Materials

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CRIMINAL LAW

CASES AND MATERIALS

Second Edition

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CHAPTER 1

BASIC PRINCIPLES OF THE CRIMINAL LAW

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INTRODUCTION

When law students begin their study of the criminal law, they often expect to deal with exciting search and seizure issues, illegal arrests, questionable interrogations, tainted confessions, and the like. In other words, they imagine a fun-filled course packed with the sorts of issues that occupy the episodes of TV shows like *Law & Order* and *NYPD Blue*. When they find out that substantive criminal law deals with none of these subjects, they may be disappointed. At most law schools, the constitutional restrictions on searches and seizures, arrests, interrogations and confessions are covered in the basic Criminal Procedure class, not Criminal Law. Criminal procedure concerns the legal limits on how people identified as possible or actual criminals may be treated by law enforcement personnel, by prosecuting attorneys, by the judiciary, and by the prison system. It is the law of criminal procedure (and to some extent the law of evidence and trial procedure) that makes for the exciting courtroom action portrayed in movies and television shows.

Substantive criminal law, however, is interesting and important in its own right. Substantive criminal law (hereafter simply *criminal law*) answers these questions: How do various jurisdictions define their criminal offenses? What are the basic elements common to every crime in the Anglo–American tradition? What does the prosecution have to prove in order for the fact-finder to find a person guilty? What are the elements of particular crimes, like murder, rape, or burglary? What distinguishes first degree from second degree murder?

Criminal law also answers the question, what level of punishment does the person who has committed a crime deserve? The rules of criminal law tell us what a person must do to be considered guilty of a crime, but not everyone who has technically violated a statute will be treated in the same way. Sometimes the issue is whether a person ought to be considered capable of committing a crime at all. For example, the insanity defense is based on the theory that people who commit crimes because they are insane lack the capacity to make moral choices which is a prerequisite for

criminal punishment. Other times, assuming the person is capable of moral choice, the issue is whether and to what extent that choice reflected values and beliefs shared by many in our culture, rendering the person's actions excusable or justifiable. For example, a person who kills someone else in the "heat of passion" is considered less blameworthy than a person who kills someone else in cold blood. A person who kills in self-defense may not be considered blameworthy at all.

As the preceding paragraph suggests, criminal law is inextricably intertwined with issues of morality. This being the case, answers to the questions it asks may vary from person to person. Thus, criminal law in part engages one's moral intuitions, and criminal law is often taught as a branch of moral philosophy.

But people do not develop their moral intuitions in a vacuum. We grow up in a *culture*, socialized by family, friends, schools and mass media into accepting some broad beliefs and rejecting others. Like any other culture, Anglo–American culture includes widely-held ideas about responsibility, blame, and punishment, and these ideas have shaped our criminal law. In this book, we approach criminal law as a system of cultural meaning, and Anglo–American criminal law as a reflection of Anglo–American moral culture.

This is where things get really interesting, for no culture is monolithic. First, cultural meanings change over time. Second, the same culture may contain conflicting beliefs and values. Third, cultures often contain subcultures with very different traditions and perspectives, and this is certainly true of the United States. Some of these subcultures emerge because the United States is a multicultural nation, composed of immigrants (voluntary and involuntary) from many different countries. Other subcultures have emerged through the long-term effects of social inequality: men and women, for example, are sometimes said to live in different cultures. When there is no cultural consensus on moral issues, whose view gets written into the law? Should the trier of fact—whether a judge or a jury—be educated about different cultural perspectives on a person's behavior? When does a legal rule or doctrine become so lacking in support from contemporary moral culture that it should be abolished or radically altered? What are the means by which such a rule or doctrine may be changed so as to reflect a new moral consensus? What is the proper relationship between culture and morality? These are some of the questions raised by the study of substantive criminal law.

In addition to being a system of cultural meaning, criminal law is part of a legal system, and this in itself raises interesting and important issues. Criminal law reflects popular morality, but law is also partly autonomous from morality. Not everything that is a moral duty is necessarily also a legal duty. To what extent should criminal law reflect the minimum standards of behavior necessary to a functioning society, and to what extent should it push people to be better to one another than they might otherwise choose? What is the appropriate role for each of the different

institutions that shape and enforce substantive criminal law—judges, juries, trial courts, appellate courts, legislatures? What discretion is or should be available to each institutional actor to apply or interpret the law the way she or he sees fit? How is that discretion limited—by constitutional rules, by rules of interpretation, or by the actions of other actors within the criminal justice system?

The study of criminal law, then, is both the study of what is and what ought to be. You will learn what the rules are and also have the chance to examine critically whether those rules serve the goals of reflecting a general cultural and moral consensus. You will have the chance to ponder whether the rules strike an appropriate balance between how we would like people to act in a perfect world and what we can reasonably expect of them, and whether they facilitate the efficient and just operation of a necessarily imperfect legal system. This is not the flashy stuff of *Law & Order*, but it is just as pressing.

THE AIMS OF THE CRIMINAL LAW

Henry M. Hart, Jr.
23 Law & Contemp. Probs. 401 (1958)

* * * What do we mean by "crime" and "criminal"? Or, put more accurately, what should we understand to be "the method of the criminal law," the use of which is in question? This latter way of formulating the preliminary inquiry is more accurate, because it pictures the criminal law as a process, a way of doing something, which is what it is. * * *

What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. "Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. "Support your wife and children," and "File your income tax return."

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community, in other words, in the community's behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions

prohibiting or requiring described types of conduct, and the community's tribunals enforce these commands. What, then, is distinctive about the method of the criminal law?

Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. The civil law is framed and interpreted and enforced with a constant eye to these social interests. Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of "civil" enforcement actions—for an injunction, for the recovery of a "civil" penalty, or even for the detention of the defendant by public authority. Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings. * * *

4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:

> The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community. * * *

At least under existing law, there is a vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has.

A. SOURCES OF CRIMINAL LAW

Law students often find substantive criminal law frustrating because there is no nationwide criminal code. Each of the fifty states, the District of Columbia and the federal government has its own criminal code (also known as a penal code). The United States military, in addition, has its own criminal code. Fortunately, even though criminal provisions differ from jurisdiction to jurisdiction, there are certain basic principles of criminal law which are sufficiently common to most jurisdictions to enable generalizations about the basic elements of most crimes and the basic elements of most defenses. In addition, all the criminal laws of every jurisdiction of the United States are subject to the same constraints imposed by the United States Constitution.

Because the United States began as colonies of England, all criminal codes in the United States broadly recognize the crimes and defenses developed by English judges over many centuries and then imported here. However, the definition of these crimes and defenses, and how penal codes should be read and interpreted, depends on whether one is in a jurisdiction in which the code principally follows the common law or one in which the code has incorporated reforms taken from the Model Penal Code. We can speak of these as *common law* jurisdictions and *Model Penal Code* jurisdictions.

In common law jurisdictions, judges continue to play an important role in shaping the criminal law. Courts in these jurisdictions must interpret statutes that are often very old and that may incorporate archaic language and concepts. Judges in common law jurisdictions both definitively interpret the meaning of criminal statutes and occasionally go beyond the statutes to announce new rules of their own. This book contains many excerpts from appellate court opinions in order to articulate and examine criminal law in common law jurisdictions.

Other jurisdictions have recently sought to update and reform their criminal codes. Most of these reform efforts have been influenced by the Model Penal Code (hereafter MPC). The MPC is a product of the American Law Institute (ALI), an organization composed of judges, lawyers, and law professors. When the ALI was organized, it saw itself as a body of experts that would try to influence state law by writing "restatements" of various subject matter areas, like Torts and Contracts. These restatements purported to simply set forth the common law of all the states in a clear, organized, and comprehensive way, but in fact they often incorporated significant reforms. The ALI hoped that the states would change their own laws to conform with the restatements, and many of these restatements have been highly influential with state legislatures.

When it came to the criminal law, the ALI concluded that the statutory and case law of the various states was such a hopelessly confusing and obsolete mishmash that "restatement" would be the wrong

word. Instead, the ALI drafted its own criminal code from scratch. Drafting of the MPC began in 1952, and in 1962, after thirteen tentative drafts with accompanying explanatory Commentaries, the ALI approved and published its Proposed Official Draft of the MPC. Although no state has adopted the MPC in its entirety, between 1962 and 1984 thirty-four states enacted completely new criminal codes, all of them influenced to some extent by the MPC. In these jurisdictions, the language of the statute is more important than prior decisions of judges in figuring out "what the law is." You will find excerpts from the MPC in the Appendix to this casebook.

In common law jurisdictions, then, one primarily relies on the decisions of judges to find out what the criminal law is; in MPC jurisdictions, one primarily relies on the statutory language itself. In both kinds of jurisdictions, however, criminal law is influenced by federal law.[a] The most important source of federal law is the United States Constitution. The Constitution does not specifically set forth any crimes or defenses. However, some provisions of the Constitution set limitations on the way states can criminally punish behavior. We will examine some of these limitations in Chapter 2.

B. JUSTIFICATIONS FOR PUNISHMENT

The arguments traditionally used to justify criminal punishment come from moral philosophy. These moral justifications for punishment are not only discussed by theorists, but are frequently used by policymakers in public debate and by attorneys and judges in legal proceedings to evaluate the efficiency and fairness of the criminal justice system. Legislators and judges use concepts taken from moral philosophy when writing or revising criminal statutes, when sentencing convicted criminals, and when making "policy" arguments about the fairness of a law. We therefore need to briefly examine these philosophical principles in order to understand the traditional justifications for punishment.

Traditional moral reasoning is usually divided into two types: *consequentialist* and *nonconsequentialist.* The consequentialist believes that actions are morally right if, and only if, they result in desirable consequences. The primary consequentialist theory of punishment is called *utilitarianism*. Utilitarians tend to look forward at the predictable effects of punishment on the offender and/or society. The nonconsequentialist, in contrast, believes that actions are morally right or wrong in themselves, regardless of the consequences. The primary nonconsequentialist theory of punishment is called *retributivism*. Retributivists typically look backwards at the harm caused by the crime and attempt to calibrate the punishment

a. Congress has no general constitutional authority to make criminal law, so the principal authority for enacting criminal statutes lies with the states, rather than the federal government. However, Congress does enact many criminal statutes (including, for example, drug laws) by virtue of its power over interstate commerce. Congress also has the authority to make criminal law for the District of Columbia, for the military, and for territories under its jurisdiction, such as Indian reservations.

to the crime. Debates over criminal law and policy usually involve a mixture of utilitarian and retributivist arguments.

The first excerpt in this section, a famous English case, provides fodder for a rich discussion regarding the basic theories of punishment. The second excerpt represents a contemporary American use of the traditional justifications for punishment in a sentencing decision. The third excerpt looks at the traditional justifications for punishment as they play out in a contemporary American prison.

REGINA v. DUDLEY AND STEPHENS

Queen's Bench Division
14 Q.B.D. 273 (1884)

* * * The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the wilful murder of Richard Parker on July 25, 1884, on the high seas, within the jurisdiction of the Admiralty of England. They were tried at the winter assizes at Exeter on Nov. 6, 1884, before Huddleston, B., when at the suggestion of the learned judge, the jury returned a special verdict, setting out the facts, and referred the matter to the Divisional Court for its decision.

The special verdict was as follows:

The jurors, upon their oath, say and find that, on July 5, 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat. That in this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day, when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and it was probably more than a thousand miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that someone should be sacrificed to save the rest, but Brooks dissented, and the boy to whom they were understood to refer was not consulted. That on July 24, the day before the act now in question, the prisoner Dudley proposed to Stephens and to Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested that it would be better to kill the boy that their lives should be saved, and the prisoner Dudley proposed that if there

was no vessel in sight by the morrow morning the boy should be killed. That next day, July 25, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner, Captain Dudley, offered a prayer, asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That the prisoner Dudley, with the assent of the prisoner Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there. That the three men fed upon the body and blood of the boy for four days. That on the fourth day after the act had been committed, the boat was picked up by a passing vessel, and the prisoners were rescued still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That, if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under the circumstances there appeared to the prisoners every probability that, unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of saving life except by killing someone for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the three men.

But whether [the killing of Parker by Dudley and Stephens] be felony and murder or not the said jurors so as aforesaid chosen, tried, and sworn, are ignorant, and pray the advice of the court thereupon.

Dec. 9, 1884.

The following judgment of the court was delivered by LORD COLERIDGE, C.J.—

The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on July 25 in the present year. They were tried before Huddleston, B., at Exeter on Nov. 6, and, under the direction of my learned brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment. From the facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation and to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned brother's notes. But nevertheless this is clear, that the prisoners

put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with a certainty of depriving him of any possible chance of survival. The verdict finds in terms that: "if the men had not fed upon the body of the boy, they would probably not have survived . . ." and that "the boy, being in a much weaker condition, was likely to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, them who killed him. Under these circumstances the jury say they are ignorant whether those who killed him were guilty of murder, and have referred it to this court to say what [are] the legal consequences which follow from the facts which they have found.

[HIS LORDSHIP dealt with objections taken by counsel for the prisoners which do not call for report, and continued:] There remains to be considered the real question in the case—whether killing, under the circumstances set forth in the verdict, be or be not murder. * * *

First, it is said that it follows, from various definitions of murder in books of authority—which definitions imply, if they do not state, the doctrine—that, in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or anyone else. But, if these definitions be looked at, they will not be found to sustain the contention. * * * [I]t is clear that Bracton is speaking of necessity in the ordinary sense, the repelling by violence—violence justified so far as it was necessary for the object—any illegal violence used towards oneself.* * * Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one own's to be what is commonly called self-defence.... Lord Hale himself has made it clear, for, in the chapter in which he deals with the exemption created by compulsion or necessity, he thus expresses himself (1 Hale, P.C. 51):

> If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder if he commit the act, for he ought rather to die himself than to kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for, by the violence of the assault and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own protector. * * *

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. * * *

Except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign or in the defence of their country. It is admitted that deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so.

To preserve one's life is generally speaking, a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children * * *—these duties impose on men the moral necessity, not of the preservation, but of the sacrifice, of their lives for others, from which in no country—least of all it is to be hoped in England—will men ever shrink, as indeed they have not shrunk. It is not correct, therefore, to say that there is any absolute and unqualified necessity to preserve one's life. * * *

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No. * * *

There is no path safe for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or

weaken in any manner the legal definition of the crime. It is, therefore, our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.

The Lord Chief Justice thereupon passed sentence of death in the usual form.[a]

Judgment for the Crown.

NOTE

Do you think the sentence of death was an appropriate punishment? Consider five different theories of punishment: (1) general deterrence (punishment to deter others from committing the same or similar offenses), (2) specific deterrence (punishment to deter the individual defendant from committing the same crime in the future), (3) rehabilitation (reforming the defendant through vocational training, counseling, drug rehabilitation, etc.), (4) incapacitation (incarceration to keep the defendant away from other members of society), and (5) retribution (giving the defendant what he deserves).

PEOPLE v. SUITTE

New York State Supreme Court, Appellate Division
455 N.Y.S.2d 675, 90 A.D.2d 80 (N.Y. App. Div. 1982)

LAZER, JUSTICE PRESIDING.

The defendant has pleaded guilty to criminal possession of a weapon in the fourth degree, a class A misdemeanor. The sentence we review consists of 30 days of imprisonment and three years of probation, the jail time to be a condition of and to run concurrently with the period of probation. Execution of the sentence has been stayed pending this appeal.
* * *

When arrested in January, 1981, for unauthorized use of a motor vehicle, based on what seems to have been a misunderstanding, James Suitte was found to possess a loaded Sterling .25 calibre automatic pistol. Although Mr. Suitte had registered the gun in North Carolina when he acquired it there in 1973, he carried it unlicensed in this State for the seven and one-half-year period preceding his arrest. College educated for three years, Mr. Suitte is 46 years old, has been married for 25 years, and has two children, aged 14 and 21 years. He has never before been convicted of a crime. Although he admits he was aware of New York's gun licensing requirement, he claims that the gun was necessary for protection

a. Apparently, a pardon had been arranged in advance, so even though Dudley and Stephens were sentenced to death, they served only six months in prison. Leo Katz, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 25 (1987). Haunted by memories of what happened on the dinghy, Stephens lost his mental faculties. *Id.* Dudley moved to Australia, became an opium addict, and then died of the bubonic plague. *Id.*

because the tailor shop he operates is located in a high crime area of the Bronx.

The plea of guilty was a bargained one. Originally charged with the class D felony of criminal possession of a weapon in the third degree, Mr. Suitte was permitted to plead to the misdemeanor of possession in the fourth degree. In imposing sentence under the new gun statute and its mandatory one year imprisonment provision—publicized in the State as the "toughest gun law in the country"—the sentencing Judge found the mandatory one year jail provision too severe. He noted, however, "the Legislature, the community and indeed this Court [are] concerned with the proliferation of guns and the possession of guns by individuals in the community, regardless of the reasons, and we have such a possession in this case." He then exercised his discretion under the statute and imposed a jail sentence of 30 days plus three years probation. The jail portion of the sentence is the focus of the appeal.

The new gun statute has substantially increased the penal sanctions for possession and sale of illegal weapons. The major change from previous law is the mandatory imposition of a prison sentence of at least one year upon conviction of possession of a loaded weapon outside the home or place of business. The legislation contains additional procedures, however, which, inter alia, permit imposition of a lesser sentence upon conviction of possession in the fourth degree if "the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that such sentence would be unduly harsh." This mitigation inquiry relative to possession in the fourth degree is limited to individuals who have not been convicted of either a felony or a class A misdemeanor within the preceding five years. Other provisions of the new law prohibit preindictment plea bargaining, restrict post-indictment plea bargaining and expedite the processing of licensing requests.

The statute is an obvious expression of the State's reaction to the current avalanche of gun-related crimes. In approving the law, Governor Carey proclaimed:

> We must bring an end to the proliferation of illegal handguns in New York and the intolerable assaults on law enforcement officers and law-abiding citizens. We must let it be known that New York has the toughest gun law in the country and that it will be strictly enforced. We are determined to rid our streets of those who would do violence to its citizens.

The Governor viewed the amended gun law as even more stringent than that of Massachusetts, which had been considered the strictest in the country. Mayor Koch termed the legislation "a significant first step in the fight to remove illegal handguns from the streets of our city."

Early returns on the law—later ones are not available—indicate that applications for gun licenses have increased, fewer gun possession cases have been reduced to misdemeanors, and sentences of incarceration have been imposed in more instances than before the law. Slightly more than

half of the adults convicted of gun possession received at least the mandatory one-year minimum.

Whatever its ultimate success in a nation bedeviled by handguns, there can be no doubt that the State's 1980 legislation represents a vivid manifestation of public policy intended to make illegal possession of guns a serious criminal offense accompanied by the strong prospect of punishment by penal servitude. While we note our colleague's negative view of the wisdom of the statute, it is not for the court to pass on the wisdom of the Legislature, for that body "has latitude in determining which ills of society require criminal sanctions, and in imposing, as it reasonably views them, punishments, even mandatory ones, appropriate to each." We turn, then, to the role of the judiciary in enforcing this public mandate that the crime of illegal possession of a gun be impressed upon all as a serious offense against society.

It is scarcely worth repetition to observe that a sentencing determination is a matter committed to the exercise of the sentencing court's discretion, for it is that court's primary responsibility. Sentencing involves consideration of the crimes charged, the particular circumstances of the offender, and the purposes of a penal sanction.

As has been oft-stated, the four principal objectives of punishment are deterrence, rehabilitation, retribution and isolation. While deterrence includes individual deterrence directed at preventing the specific offender from repeating the same or other criminal acts, it also includes general deterrence which aims to discourage the general public from recourse to crime. Rehabilitation is directed, of course, at reform of the individual, while retribution includes "the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves," community condemnation, and the community's emotional desire to punish the offender. Isolation serves simply to segregate the offender from society so as to prevent criminal conduct during the period of incarceration. It is clear that the principal aim of the 1980 gun legislation is general deterrence.

The most difficult problem confronting the sentencing judge is determination of the priority and relationship between the objectives of punishment, a matter of considerable and continuing debate. Inevitably, there are bound to be differences of opinion in the relative values assigned these factors in particular cases. The theories frequently are in unavoidable and constant conflict and those that prevail in the sentencer's mind obviously decide the degree of punishment. Much of the controversy and criticism swirling about the contemporary sentencing scene relates to inequitable disparities between sentences for the same or similar crimes. The disparities derive primarily from differing philosophies and attitudes of judges and a lack of consensus concerning the goals of criminal justice.

Appellate review of sentences obviously is a useful means of diminishing sentencing disparity and ensuring the imposition of fair sentences. Nevertheless, the limited nature of appellate review of sentences is a recognition that "the sentencing decision is a matter committed to the

exercise of the [sentencing] court's discretion." A reviewing court lacks some of the first-hand knowledge of the case that the sentencing judge is in a position to obtain, and therefore the sentencer's decision should be afforded high respect. As a consequence, abuse of discretion is the test most frequently cited as the one to be applied. The abuse of discretion standard is especially befitted to an era in which most convictions derive from plea bargains where the bargaining leverages of the respective parties to the agreement are ofttimes more important in fixing the degree of the crime pleaded to and the other limits of the sentence to be imposed than matters of guilt, fault, character, mitigative circumstances or other factors which might otherwise seem more relevant. Nevertheless, since the Legislature has empowered us to modify sentences "as a matter of discretion in the interest of justice" and our general review powers include the right to do whatever the trial court could have done even in matters entrusted to the discretion of that court, we can substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence. The power to substitute discretion helps us to meet recommended sentence review standards by making any disposition the sentencing court could have made, except an increased sentence. Without the substitution power, our ability to rectify sentencing disparities, reach extraordinary situations, and effectively set sentencing policy through the development of sentencing criteria, would be sorely handicapped.

Appellate review determines whether the sentence is excessive to the extent that there was a failure to observe the principles of sentencing. In such review, the court takes a "second look" at the sentences in light of the societal aims which such sanctions should achieve. But in reducing any sentence, the appellate body must be sensitive to the fact that its actions become guidelines for the trial court to follow in the imposition of future sentences under circumstances similar to the case reviewed.

In the current case, there has been no abuse of discretion and we perceive neither a failure to observe sentencing principles nor a need to impose a different view of discretion than that of the sentencing judge. True, the defendant does not appear to be a danger to society or in apparent need of rehabilitation. It is plain, however, that the sentencing court viewed general deterrence as the overriding principle, and we cannot say that the emphasis was erroneous or that the interests of justice call for a reduction. Deterrence is the primary and essential postulate of almost all criminal law systems. In this era of conflict between the adherents of the rehabilitation model and those who advocate determinative sentencing, it is hardly debatable that prisons do deter even if the degree of deterrence and the types of persons deterred remain in dispute. Even when imposing an "individualized" sentence, the judge may look beyond the offender to the presumed effect of the sentence on others. Indeed, the primary purpose behind mandatory sentence laws is to impose swift and certain punishment on the offender. A short definite period of confinement under the circumstances has been seen as the most effective method

of deterrence. As Marvin Frankel has written, general deterrence may be satisfied through "relatively short but substantially inexorable sentences to prison." Some commentators have concluded that lesser punishment for firearm crimes, e.g., fines, probation or suspended sentences, is not significant enough to have any real deterrent effect.

In emphasizing the mandatory minimum sentence and the purpose of deterrence, the new gun legislation intended to convey to the public a "get tough" message on crime. In this regard, the advertisements heralding the new law are significant; thus: "If you get caught carrying an illegal handgun, you'll go to jail for one year. No plea bargaining. No judges feeling sorry for you. Just one year in jail."

With such a background, we cannot view the new gun law as containing a blanket exception of first offenders from the scope of its penal provisions. The statute's provisions for mitigation are not carte blanche for the commission of one offense free of the threat of a sentence of custodial detention. The sense of the new law is to deter all unlicensed handgun possessions, whether the offense is the first or a repeat. The special mitigation inquiry is not intended to provide automatic probation for those without prior criminal records. The penalty to be imposed is a matter for the trial court's broad discretion within the limits imposed by the Legislature. In balancing the public and private interests represented in the criminal justice process, the sentencing court's decision in this case was neither inconsistent with sound sentencing principles, nor inappropriate. We see nothing obscene about a 30–day jail sentence (which is subject to a 10–day reduction for good behavior) for possession of a gun, particularly when the defendant has a history of carrying the weapon for over seven years with knowledge of the law's requirements.

Reduction of the current sentence by this court would proclaim to those listening that the new gun law presents no threat of jail to first criminal offenders. Such a reduction would also declare to the trial bench that a judge who imposes a 30–day jail sentence on such a first offender has either abused his discretion or that this court disagrees with the sentencer's evaluation of the relevant sentencing factors. Finally, reduction would be this court's expression that violation of the gun law is nothing serious.

Accordingly, the sentence is affirmed.

O'CONNOR, JUSTICE (dissenting).

In his usual scholarly and impelling style, my esteemed confrere of the majority, Justice LAZER, reviews the principles and discusses the rationale attendant upon sentencing and its appellate review. And so we go pell mell on our merry, merry way! More crimes are committed, more police make more arrests, more D.A.'s process more cases, more judges commit more people to jail, and here, the majority would affirm a jail sentence despite the presence of what, by any standard, was an abuse of sentencing discretion that warrants, nay demands, a reduction to probation. I cannot agree.

Recently released Justice Department figures for 1981 indicate that there were 369,000 adults in Federal and State prisons at the end of that year, plus nearly 157,000 in local jails. The National Council on Crime and Delinquency reports that the United States trails only the Soviet Union and South Africa (what a combination!) in its per capita rate of incarceration and, contrary to popular belief, in the severity of the punishments it inflicts! And in spite of it all, the crime rate continues to soar. * * *

It seems to me that it's about time we begin to find, in matters such as this where no violence or even threat of violence is present, alternatives to jail. I further believe that rather than joining those who bend before the incessant cry of a rightly outraged public for vengeance we, as appellate judges, should seek to put some sanity into the sentences we approve under these circumstances.

I agree with the principle, articulated in the majority opinion, that an appellate court ought not disturb a sentence in the absence of an abuse of discretion by the sentencing court or unless the interest of justice so requires. I further agree that a workable test for applying this principle is whether the alleged excessiveness of the challenged sentence in fact demonstrates a failure by the sentencing court to observe the purposes of sentencing: individual and general deterrence, rehabilitation, retribution and isolation. I can even agree to the soundness of visiting upon one individual a punishment greater than would have been his had the sentencing court not decided to make an example of him in order to curb sharply a sudden manifestation in the general public of pernicious conduct previously endemic to certain subclasses, e.g., drug abuse, or to overcome widespread public intransigence to legislated curbs on historically unregulated conduct such as gun possession. But I disagree with the majority's statement that the sentencing judge, rather than this court, may on an ad hoc basis, subject only to personal predilections, establish the coefficients to the four variables of deterrence, rehabilitation, retribution and isolation in this sentencing formula. This court should not abdicate its responsibility for the assignment of appropriate, if somewhat inexact, weights to these factors in the discharge of its obligation to control sentencing discretion within the overarching limits fixed by the Penal Law.

Is it just or proper that we permit one sentencing judge to count general deterrence as the overriding factor in this gun possession case under the new anti-gun law, with the implication that another sentencing judge in a factually identical case may switch the emphasis in the formula to another factor, e.g., rehabilitation? Bear in mind that the difference resulting from our toleration of such ad hoc legislating by sentencing judges is incarceration, and I most vehemently reject any argument that incarceration is but a gentle escalation of sanctions to the point at which a real deterrent effect can finally be ascertained operating on the populace. After all, 30 days in the county jail will surely cripple the spirit of any otherwise law-abiding citizen who honestly believed that the cost of unlawfully possessing a gun (discounted tremendously by the infinitesimally small probability of being caught) outweighed the benefit of protect-

ing his life while conducting his livelihood in an urban war zone. I submit that it is we, as the Appellate Division, that should assign the approximate values to the parameters of the sentencing formula (to the extent possible), and that we should restrict sentencing judges to their proper role in applying this legal formula, as so weighted, to the facts as they find them in individual cases.

I pose the questions:

(1) Is it a proper exercise of discretion to sentence to jail a first offender who poses no serious threat to the community?

(2) Does the nature of the crime here committed make it a serious threat to the community?

With these thoughts in mind, let us look at the case at bar.

On the morning of January 20, 1981, while driving through Nassau County on his way to his place of business in New York City, the defendant was stopped and arrested on a bench warrant charging him with the unauthorized use of a motor vehicle.

The validity of that warrant, or the merits of the complaint upon which it was issued, are not before the court at this time, but it should be noted that it is defendant's contention that the charge is totally without substance, arising, he alleges, out of a misunderstanding involving the return by him of a rented automobile.

Be that as it may, upon his arrest he was found in possession of a loaded Sterling .25 caliber automatic pistol. He was promptly charged with the crime of criminal possession of a weapon in the third degree, a class D felony, was convicted on his plea of guilty to possession in the fourth degree, a class A misdemeanor, and was sentenced to three years probation with the special condition that he serve a determinate sentence of 30 days in the Nassau County Correctional Center. Execution of that sentence has been stayed pending appeal.

Upon appeal to this court as excessive, that sentence has been affirmed by my confreres of the majority. I respectfully disagree and strongly suggest that under the facts and circumstances here extant, it is totally inappropriate and completely counterproductive to impose a jail sentence for however short a period of time.

An objective review of the record establishes that this defendant, a successful businessman, with three years of college education, is married and the father of two children, a daughter, aged 21, and a son, 14 years of age.

Since 1973 the defendant has owned and operated a custom tailer [sic] shop which is located in a high-crime area of the Bronx. A prior owner of the shop had been stabbed during one of several robberies that took place before defendant became the proprietor. The defendant lawfully purchased the gun in question in North Carolina and properly registered it in that State.

According to the arresting officers, the defendant was "very cooperative" when arrested, and readily admitted that he knew that it was illegal to carry an unregistered pistol in New York City and stated that although he had inquired about obtaining a gun permit, he had never completed the process. The defendant told the police that he thought he needed the gun for self-protection.

The Probation Report contains this significant appraisal:

> The present offense is the defendant's only criminal conviction and his first criminal charge in 21 years. He appears to be a devoted father and husband, as well as a productive member of society. There is no evidence of criminal intent in his possession of this weapon and his desire for protection in his business neighborhood is justified.

No one can sustain this defendant, or any person, in the illegal possession of a loaded firearm. It is a clear violation of law and calls for an appropriate sanction and penalty. But under the clear and compelling circumstances here present, is it appropriate or fair or just to send this first offender off to jail for 30 days, 10 days or even one day? To me, such a sentence based upon these facts is cruel and harsh and borders on the obscene.

It is beyond cavil that violent crime is ever on the increase and that it is, in all its terrifying aspects, continuously creating conditions of unspeakable horror on the streets of our cities. Out of these jungle conditions in crescendo fashion, the cry of an aroused and frightened public is heard demanding, with good reason, swift and effective measures to contain and to curtail the monstrous abominations which are daily visited upon them. The fire is fueled by those who should and do know better but who, seizing upon a popular theme, pick up the cry and, by some total distortion of reason, imply that the fault lies with the judiciary and suggest that tougher and longer prison sentences are the solution. The Legislature responds by passing more and more mandatory sentencing laws and the press and other news media not infrequently give at least tacit approval to such measures. And all the time, judges, sitting in the eye of the storm, know that the catastrophic rise in crime bespeaks a failure not alone of society, but of the family, the church, the schools, the home and of the economic and political structure of the State itself. We know, too, that there are as many reasons for crime as there are people who commit it and we have long since learned that there is no simple solution or ready answer to the problem. I have previously expressed my disapproval of mandatory sentences because of a firmly held opinion that mandatory sentences give to a worried and frightened public the illusion of protection, that they do not deter the criminal and, worst of all, that they incapacitate a major section of the system of criminal justice in denying discretion to the courts. Are we really ready to give up on the theory that the punishment fit the crime?

To the issue before us—to tack on an additional jail sentence for the possession and/or use of the gun, loaded or unloaded, in or about the

commission of a crime, makes much sense and may even be effective. However, to send an otherwise law-abiding citizen to jail on his first offense under the facts of this case makes no sense, accomplishes no good and creates nothing but untoward hardship and bitterness. I respectfully dissent and would modify the sentence by striking the 30–day period of incarceration.

HAVEN OR HELL? INSIDE LORTON CENTRAL PRISON: EXPERIENCES OF PUNISHMENT JUSTIFIED

Robert Blecker[a]
42 Stan. L. Rev. 1149 (1990)

I. INTRODUCTION

* * *

A. *The Problem: Justifying Punishment*

Why and how should we punish these criminals? A fearful and furious citizen may demand: "First, get them off the streets; keep them away from us. Make them suffer: They deserve it. Teach them a lesson they will not forget. And let their pain and suffering be an example to others. Maybe then, having been punished, someday, somehow, these criminals will feel remorse, change their attitudes, and productively reintegrate into society." Drawing upon sentiments and concepts implicit in the Bible and the works of Plato, Hobbes, Beccaria, Kant, Bentham, and a host of contemporary commentators, the citizen urges that punishment serve as incapacitation, retribution, general deterrence, specific deterrence, and rehabilitation.

The precise definition of each concept differs with each advocate, antagonist, or analyst. Essentially, however, *incapacitation* is rendering harmless to society a person otherwise inclined to crime. *Retribution* is the intentional infliction of pain and suffering on a criminal to the extent he deserves it because he has willingly committed a crime. *General deterrence* is the pressure that the example of one criminal's pain and suffering exerts on potential criminals to forgo their contemplated crimes. *Specific deterrence* is the pressure that unpleasant memories of incarceration exert on a released convict, which cause him to obey the law. *Rehabilitation* is the acquisition of skills or values which convert a criminal into a law-abiding citizen. * * *

Those who do [prioritize] among the various justifications or purposes of punishment, almost without exception address the problem conceptually, as a matter of logic or philosophy. Without discussion, they assume that an appropriate blend of retribution, deterrence, incapacitation, and rehabilitation ultimately translates into a number, or number range, such

a. Robert Blecker, a criminal law professor at New York Law School, interviewed street criminals in Lorton prison and on the streets of Washington, D.C. from 1986 to 1999.

as "10 years in prison" or "5-to-15 years in prison." A legislature or court need merely increase or decrease the length of the "sentence" to increase or decrease retribution, rehabilitation, deterrence, or incapacitation. Often this abstraction is obscured: the number *becomes* the punishment rather than a symbol of its duration which is only one dimension of a prisoner's actual pain and suffering.

Punishment, however, is not merely the quantity of time in prison. *The reality of each criminal's punishment consists in the experience of that punishment.* What actually happens to prisoners—their daily pain and suffering inside prison—is the only true measure of whether the traditional concepts have meaning, the traditional goals are fulfilled, the traditional definitions apply. Only through the prisoners' experience can we test the categories, clarify these concepts, and set priorities. * * * This study, then, attempts to bridge the gap between traditional penal philosophy and the actual experience of punishment. * * *

II. INSIDE LORTON CENTRAL

Retribution, deterrence (general and specific), rehabilitation, and incapacitation represent overlapping and antithetical perspectives on why, when, and to what degree criminals should undergo pain and suffering through punishment. In order to evaluate these various definitions, justifications, and goals of punishment, therefore, we need to know whether and how prisoners do in fact suffer inside Lorton Central.

Of course everyone's "bit"—time spent in prison—is different. One individual feels a loss of freedom more or less than another. A forced separation from home, and the streets, and entrance into a new prison environment can be more or less painful. Losing family ties may cause a criminal to suffer differently at different stages of life. And in the course of each day, moment to moment, a prisoner's experience of prison changes. * * *

C. Haven or Hell?

* * * What is the real experience of Lorton? Obviously it depends. Some guys breeze through it; others live in agony. Even Douglas Wright who called Lorton a "playground" qualified it: "[A] playground to all those youngsters who don't know what's happening."

Almost uniformly the older inmates condemn Lorton Central as a "deathtrap." "You can get killed because you have no protection," said Danny Bethel, one of many prisoners who has been stabbed. "You can't go to a dark room; you can't take a bucket and wash your clothes without realizing it's possible you might not come out. It's no such place as that you're guaranteed to see tomorrow. You go to bed with a nightmare, and the only peace that you ever get is not waking up at all." * * *

III. THE EXPERIENCE OF LORTON CENTRAL JUSTIFIED

A. Retribution

> He who kills a man shall be put to death.... When a man causes a disfigurement in his neighbor, as he has done it shall be done to him,

fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured. *Leviticus 24:17–20*

Retribution is perhaps the oldest measure of punishment: like for like—pain and suffering for pain and suffering. The Bible commands: "[A]s he has done, it shall be done to him." Scorned by a shrinking majority of scholars, retribution continues to be embraced by a large majority of citizens. Retributivists have recognized that strict repayment is not always possible: If a criminal takes out the only eye of a one-eyed man, surely to take out only one of his two good eyes is not full retribution, whereas to take them both out is not exact recompense. Retribution has advanced beyond exact retaliation to become what it is today—*proportional punishment.* Punishment should be proportional to the gravity of the crime.

Retributivists differ as to the appropriate length and intensity of punishment attaching to particular crimes. Some may see violent crime as incomparably more deserving of punishment than non-violent crime; others may feel that crimes which affect the public generally, such as illegally dumping toxic wastes, or cheating the elderly out of their life savings, or a public official's bribe-receiving deserve the greater punishment. * * * Since Aristotle, *malum in se,* a thing bad in itself, has been distinguished from *malum prohibitum,* a thing bad only because defined as illegal, or as inmate Alvin Hines called it, "a man-made crime." Murder, rape, robbery: These are serious crimes, bad in themselves. But is selling drugs? In 1990, a small but respectable chorus including judges and legislators calls for the legalization of narcotics. Yet, during this era of prohibition, many prisoners are serving very long and painful sentences for engaging in truly consensual transactions that perhaps should not be illegal, while others for whom killing is a business decision, who maintain deadly workplaces or poison our water are sentenced to community service or not punished at all. Is this proportional? * * *

In theory, prison life should be tougher for serious felons, and by privileges and courtesies extended, it should be relatively more comfortable for less serious offenders. But inside Lorton Central, theory and reality do not match.

Inside Central a man's crime is virtually ignored. Officers routinely deny that they treat a prisoner with an eye to his record, to his crime, to his "evil" choice that brought him to prison. Captain Frank Townshend, a long-time, well-respected, tough-but-fair officer, insisted that he never looks at a man's record when he deals with him lest he be "prejudiced. Everyone is entitled to the same treatment here, regardless of what they did to get here. What a man is in here for is not our concern." * * *

All officers interviewed agreed: They never consult a man's record, and sometimes for good reasons. "If you know a man is a murderer, you may fear him, and he will sense that. They pick up those things," said one officer, "so I don't want to know. I make it a point not to know." One female officer offered a similar rationale. She does not check the records,

for if she discovers a man is a rapist, she will feel apprehensive about disciplining him. Even when officers do know the criminals' records, they do not treat the more serious offenders more harshly. Rather, they concentrate on behavior which may cause problems in prison. "Inside, a thief is more dangerous than a murderer," observed Sergeant Shipley. "The thief will continue to steal whenever he can, and get himself or someone else stabbed or killed. So he's the one, day to day, that you have to come down hard on." * * *

Overwhelmingly then, by their actions and attitudes consistent with official D.C. Department of Corrections policy, officers and inmates reject retribution as a goal of punishment on the inside for past conduct on the outside. To them, the judge metes out punishment by setting the number of years during which all inmates will be equally deprived of liberty. The officers see no point in trying to make prison more painful for prisoners because they "deserve" it, unless they deserve it for their conduct inside prison. By consciously ignoring prisoners' criminal records, however, officers unwittingly help sever the essential retributive connection between the past crime committed and the present punishment experienced. As Captain Townshend said, "It's none of my business. What a man is like in here is what I concerned with, not what he did out there."

The prisoners further help cut all connection between crime on the street and punishment inside the joint. With the exception of rape which they scorn, and child molestation or crimes against the elderly for which a prisoner may be ostracized or physically attacked, whatever a person did on the outside is his own business. Each man is a hustler, trying to survive. * * *

B. General Deterrence

Deterrence lies at the very source of Western culture. Although the Old Testament is retributive in its measure of punishment—an eye for an eye—it is fundamentally deterrent in its justification and purpose. Over and over, the Bible calls for harsh punishment, not only because an individual deserves it on account of his past transgression, but also for the future benefit it will bring to others: "[T]hen you shall do to him as he had meant to do to his brother.... And the rest shall hear, and fear, and shall never again commit any such evil among you." * * *

According to the psychology expounded by Beccaria and Bentham, a rational pleasure seeker defers immediate illegal gratification because a threat of future punishment weighs decisively in his pleasure/pain, cost/benefit calculus. Convicts as well as commentators dismiss this psychology of the rational prudent calculating maximizer as fantastic—an ideal inapplicable to the streets: General deterrence is unreal and unworkable; people do not consciously weigh costs and benefits before they engage in crime.

A litmus question to the inmates at Lorton Central—"Before you pulled the trigger [or robbed] did you ever think about what would happen

if you were caught?"—revealed minds unconcerned with future punishment in moments immediately surrounding the criminal act:

"Nah, never thought about it," said inmate David Basnight, "until one time, and that's probably why I got caught. I just stood there, looking at the camera, thinking."

"Did you ever think about getting caught?" inmate Harry Rowe was asked.

"No."

"Never occurred to you?"

"No."

"Never thought about going to jail?"

"Well, *I'd been told,* but you know, I ain't never really thought about it. . . ."

"And the day you did it, it never passed through your mind that 'Hey, I might get caught, this might be the last day'?"

"No, I ain't think . . . that weren't on my mind. Just getting the money and getting away."

The pressing problem of the moment—getting away—includes not getting shot, and not getting caught, which may subconsciously include a future trial and eventually a prison term. But conscious calculation is not so much of punishment as of pulling it off and escaping. * * *

"Seeing another hustler fall, you say 'he did something foolish,' something you're not going to do," mused Itchy Brooks. "Sometimes a guy try to find out what he did so he won't do the same. That's the only deterrent effect that has."

When the possibility of being caught only causes a more disciplined hustler to take greater precautions or to switch to safer crimes, has deterrence succeeded?

Some criminals may be undeterrable because they do not calculate, but others are undeterrable because they do. "I had a job," said inmate Wade Briggs, "but I saw that the same amount of money it took me four weeks to work for, I could make in one day." * * *

"If I worked, there wasn't much chance of my getting more than a few thousand dollars a year and here's a chance of my getting two hundred fifty thousand dollars in a day or so. It was worth it to take the risk. Plus the federal statistics show that only a little over half of all bank robbers are caught. And eighty percent of those just ran in and grabbed the stuff. People in the banks are instructed not to create the kind of situation where somebody's going to get hurt. Because the money's insured. And really the professional is not going there to hurt nobody. He's going there to get the money. Since he knows they're instructed not to offer resistance, that's the way it's done." * * *

"The average black kid in the ghetto after that first knockdown knows that the old bootstrap trick is not really there," observed Sergeant Edmonds. "And he just takes a look around at his aunts and uncles, his parents and cousins, and he assesses how far they reached up this ladder of success. How much have they gained? And he is saying to himself 'Gee they don't got very much, old raggedy clothes, living in a run-down dump.' Then he looks right across the street. Here Joe Slick pulls up: He's got this great big shiny car, the best looking clothes on, he got his jewelry on, he's got a fine looking woman with him. The guy says 'Now that's what I want,' because this guy's got it. He is not equating that with the whole picture, but he is looking at the for-now." * * *

Family visits at Lorton could provide a most compelling occasion for images and pain to combine and produce maximum deterrence. But they don't.

Sergeant Edmonds reminisced about his first year at the prison: "It was Christmas of '80. We had a tree down in the visiting hall and in the cell blocks. And as the kids came in, the fathers came out of their cells carrying gifts. It was a mixed emotion day for me, to look at the picture we projected to the younger kids when they came here to visit. Just to watch the expression on their faces, how they would light up when they came through the control area out front. * * * They were all aglow, watching this door, waiting for their father to come through that door into that visiting hall. And they just ran to him and flung themselves on him. It made you conscious of your younger existence. And how you felt about your father. My father was in the military, so we had that kind of 'father's home, boat's in!' He's going to be here in a few minutes and everybody is all excited about it. And everybody is rushing to him. It gave me the same kind of feeling watching them.

"But by the same token, it made the children feel that this was a good place, because all the good things that occurred to them in a family sense were occurring right here inside an institution where their father was locked away at. And being punished at. So it did not build a sense of 'this is a bad place;' it built the sense of 'this is a good place'—the experience for a lot of them, of seeing for the first time both parents together, hugging and embracing and enjoying each other's company. And the kids running around the visiting hall or out in the field, having a good time with other kids from their neighborhoods within the city. * * *

"When the kids visit, you give them your best smile," Itchy agreed. "We're relaxed; nothing jumps off at the visiting hall. But they don't see our face change as we leave the hall." * * *

C. Incapacitation

Originally prison's sole purpose was to hold prisoners until trial or punishment. Today, incarceration—taking criminals from the streets and confining them—remains prison's front line, and perhaps bottom line, justification. The experience inside may not be retributive, it may not

rehabilitate the inmate, nor deter him or others, but at least that criminal is removed from society and to the prison, where he is disabled from committing further crimes. * * *

Even though sentences have gotten much longer and inmates believe escape is not that difficult today, very few prisoners plan or attempt it. * * * What keeps them inside? Less a fear of being shot while scaling the fence, than the punishment which follows an unsuccessful escape attempt: Transfer. Lorton, Virginia is easily accessible to Washington, D.C. As Reggie Brooks said, "They got three or four of their little buddies serving life sentences with them here, and they're in heaven." A transfer to Wala Wala [*sic*], Leavenworth or another remote prison cuts off an inmate from his family, friends, his familiar environment. Punishing escape with transfer deters; it is also ironically retributive.

An inmate who does not escape, however, is not necessarily incapacitated. Incapacitation requires more than confinement. While incarcerated, an inmate must commit no crimes against society. Prisoners inside Central rarely assault visitors, teachers, counselors, or officers, mostly because they fear transfer. But prisoners often kill prisoners. Inside Lorton Central serious stabbings and murder attempts are an everyday event. Every inmate who wants a weapon has one. * * *

Prisoners disagree over which is more dangerous, the joint or the streets. Inside Lorton Central there are very few guns, whereas the streets of Washington, D.C. have become a battlefield. On the other hand, in the closed environment inside Central, there is nowhere to run, nowhere to hide. On the street when a guy cuts in line or "rips you off," you can ignore it. You will probably never see him again. But inside Lorton Central, with everyone watching on the side-lines, you must counter such disrespect, or others will take advantage of you. "In the street when you're doing something wrong you're seldom doing it in your neighborhood," said Johnny. "Lorton is the neighborhood. Each time you take a pair of tennis shoes, a radio, a sweatsuit, you risk your life." * * *

Thus, from the outside, the prisoners of Lorton Central seem to be incapacitated. Rarely do they cross the perimeter or even test it. Inside the prison, however, crime—the sale and possession of narcotics, theft, assault, and murder—is rampant. In the words of inmate Pete Arnold, "It's a fucking zoo."

D. Specific Deterrence

In theory, then, having committed no crimes while he is incarcerated, the prisoner, once released, carries with him painful memories of his prison experience, which continue to haunt him, pressuring him to avoid criminality and live the straight life. In theory.

If, as Hobbes defined it, memory is "decaying sense," then painful prison memories have a very short half-life: "In twenty-five days you've forgotten the experience of twenty-five years," said Itchy Brooks. "All the lessons you learned." Pressed in the streets, memories of Lorton quickly

fade. The immediate dangers, the uncertainty, and the insecurity can seem worse than life in Central with its "three hots and a cot."

"I know what the penitentiary is about. I've dealt with it," said Leo Simms. "Inside, I guess I know I can deal with it. If you check my records it seems I am able to deal with the institution better than I do with the street. You can institutionalize a person. I know what to expect here. I can be inside any institution for a week, and I can close my eyes and know the routine from hour to hour. It doesn't offer me any challenges. It's a lesser threat than I would have in the street. The decisions you have to make in the free world you don't have to make here. I know it's sad to say, a guy my age, but you can get in the habit of having people make decisions for you. You have many guys in this institution that cry every day about wanting to get out, but their actions dictate different, because in their heart they can't really want to go, because they don't know how to make it out there. * * *

Dr. Reynolds, Chief [Psychologist] at Maximum, summed it up bleakly: "Before the first time, they don't think about it; after the first time they get used to it." "When I was on the street," said Robert Moffitt, "I used to say to myself 'I wish I could go to jail for about six months or a year maybe, just to get myself together.' Jail is about the only place a man can get himself cleaned up." Specific deterrence fails miserably when prison becomes a refuge.

For some inmates, Central is not so much a refuge, but an acceptable, if unpleasant, necessity. "I operate on the premise of my being a hustler and this [is] part of it, part of the game that comes with it. It's a deterrent as far as educational things," said Rodney Hunt. "I won't make the same mistakes in the future. I'll do it another way." * * *

"You come here for stealing a car, you leave here knowing how to crack a safe," Itchy said. "This is a crime factory."

Prison experience, then, fails as a specific deterrent for the ex-convict on the streets who remembers it as a refuge, or accepts it as an inevitable part of hustling life. And the experience fails to specifically deter those it makes more cautious or those ex-convicts it opens up to new criminal opportunities. Most perversely, out on the street, specific deterrence fails when a convict's obvious indifference to repeating a long bit may make him an even more effective hustler. His threats are credible—"I've done hard time; I can do it again."

He may come out more vicious than he went in. "Prison is not a healthy place to be," said Itchy. "The people in the community say, 'Well, it's not intended to be. We don't want it to be.' Fine, so when a guy come to the gate to blow your fucking head off, then that's what you apparently wanted. You should have expected it. Because that's exactly what the fuck you're doing. When you put a man in prison and you say 'life,' then make that life. Or you're asking for it."

"What do you do with a Doberman Pinscher when you want him to be mean? You make him hungry and keep him chained up, restrained from everything. When you let him loose he goes wild. It's no different with us," Itchy said. "You in such a state of deprivation when you leave here, you want *everything* and you want it *now*. You don't want to wait. You've been waiting too long. You've been waiting on too many lines. You done took shit from too many people. You ain't taking any more shit.

"So when you go on the street with that attitude you're dangerous. And that's that. This is a monster. But where did that monster come from? You were a small monster when you came but you're a giant one when you go out of here." * * *

Why, then, doesn't every ex-prisoner return to prison? Why is any Lorton Central ex-con ever deterred? Two factors, often noted in the literature, were reflected inside the prison. "I would never come back to this place," insisted Danny Bethel. "I've overstayed my welcome. I'm too old for it and I can't take it no more. There comes a time in all of us where it's time to quit. There's no force, there's no power that can make me commit a crime. My time's over; I'm just not coming back." For many, like Bethel, Johnny, and Leo, the aging process itself makes specific deterrence work. * * *

Family is the great motivator. "It would be a lot different for me if I had a second chance," mused Earl Grier. "What it boils down to on this charge and me doing this time, is that it really wasn't worth it compared to what I have lost. * * *

E. Rehabilitation: "An Eye Patch For An Eye"

* * * Rehabilitation—or reformation—essentially consists of the acquisition of attitudes, values, habits and skills by which an "enlightened" criminal comes to value himself as a member of a society in which he can function productively and lawfully. This glossy definition is appealing, but reveals little of the rehabilitative process with its pitfalls and problems. * * *

1. Back out, back in.

"This place is not working," observed Sergeant Edmonds, stating the obvious. "But you cannot change it inside and not change the outside. Even if a guy has good intentions, and says, 'I am going to get out and go straight, be a good father, be a good provider.' He goes back out into the system we are in. He is a convicted criminal. That's one strike against him. He's black or Hispanic, so he's got two strikes against him. When he gets back out there, who's going to hire him? The average business really does not want a convict employee. What did he do? Can he be trusted? How will other employees feel with him around? So if he gets a job, it's going to be a low-level, low-paying job. But his aspirations are as high as anybody else's out there. He wants the American dream too. A lot of them

get into crime because they want the American dream. The reasons that brought him here never changed. The have-nots want to have." * * *

Itchy described the psychological corrosion of a prisoner, released after a long bit, initially determined to stay out: "You're going in the street," said Itchy, "with the fifty dollars they give you and you have a whole new situation where you haven't been making no decisions for four or five years and now you have to make them all. You haven't had to do nothing but make ugly faces and look tough in here to get by. Now looking tough don't get you nothing. So you're out there and all your good intentions, all that shit don't amount to a hill of beans, because it's back to real life, it's back to the survival struggle.... You're out there and everything is falling apart; everybody's got a family except you—yours fell apart a long time ago while you were in here.

"And your buddies come by and say 'let's take a drink.' 'Man, no, I got some things I'm trying to do' and that lasts for awhile. Because you see yourself accomplishing something, you see yourself trying to do something. But then after a few months go by and you're still in the same situation you was, you see yourself making no progress, your prospects are the same as the day you came out. Nobody's seriously offering you anything. You got some people telling you 'well if you go down and sit outside the union somebody will come by and offer you a day's work.' What is a day's work going to do toward paying the rent? You don't got enough money to more than get you a drink, or buy you some dope and put yourself out of your misery. The next thing you know, you find that all this stuff about Lorton is fuzzy in your mind. 'Damn, I sure did rough in Lorton. But at least somebody had their foot on my neck and kept me from doing better. Now, here, nobody got their foot on my neck and I still can't do better.' Then you start backsliding. You start going around with your buddies and doing things you hadn't planned on doing."

"When you leave here," said Johnny, "You don't have no money. The people you know in the street are hustling. A guy may offer you some drugs, or somebody going to say 'Here's five or six hundred dollars. Go downtown and get yourself a couple of outfits.' And then the same guy, a couple of days later, going to say 'Hey, what you doing?' And you say 'I ain't doing nothing yet. I'm still looking around.' In the course of a few weeks you're getting back into the swing of things. And then this guy come back again in the Mercedes Benz or the BMW and that six is gone. And he say 'Hey, you ready to go to work now?' And you say, 'Of course.'" * * *

Some prisoners, however, nearing the end of their term can look forward to returning to society with a home, a family, a job. Sergeant Edmonds portrayed the pressure on them: * * * "The same people that came to visit him, the same lady, children came to visit him, now have to alter their life to fit him in. Before, they didn't have to do that. They just had Tuesdays, Thursdays, Saturdays and Sundays to visit in two hour blocks and back to whatever they were doing. Now he is there full-time.

They have to integrate him into their being. Slap! 'I am back.' He wants to carry the same authoritative manner that he had when they came for those couple of hours visit. In charge. But they have lived independent of him, with the exception of the visits. Resentment builds. He is now a liability instead of an asset. Because he's not making the kind of money that is going to help motivate and lift them. What little that they now have, have to be shared with someone else. The food bill goes up. The use of the automobile is shared. All of the things that they had, now have to be shared with this guy. Even though they love him, this is a sharing thing now.

"He notices that the irritation factor is setting in, arguments ensue, words are exchanged. Now, it is crystal clear to him that something is wrong here. By now, the woman is saying 'Jesus, man, you're a drain on the family, you got to bring some money in here, we ain't going to live like this.'

"And it gets back to 'What do I know how to do?' Back on the Avenue. You are talking to your friends. You have resisted them. Maybe for six or seven months. You have resisted the temptation to put the package in your hand, or do a deal to make some money. A lot of the guys who have gotten out, the guys they see on the streets, those same role models are still out there living the high life, wads of money.

"One day you are coming up out of McDonald's, dirty and greasy, going home into the shit, arguments, and all that because you are not providing. You're choking, you are stifling them to death. And he says 'Give me the package; fuck McDonald's.' He knows from that point he's on his way home. This is his home, Lorton. The rhetoric is the rhetoric. This is home." * * *

F. The Unjustified Experience at Lorton: A Summary

Traditionally, the principal definitions, justifications, and purposes of punishment—retribution, general deterrence, specific deterrence, incapacitation, and rehabilitation—have been singly advocated in the literature. Inside Lorton Central they have been singularly violated. * * * Lorton Central may be unique among prisons in the United States, but in its failure to achieve the traditional goals of punishment, it suffers their common fate. The problem may lie in the categories themselves, used for centuries by legislatures, courts, philosophers, and law professors, with a most casual relationship to reality.

THE DILEMMA OF EXPRESSIVE PUNISHMENT

William S. DeFord
76 U. Colo. L. Rev. 843 (2005)[a]

Introduction: The Dilemma

In January 1990, Utah State Senator Paul T. Fordham presented a bill designed to address Utah's problem with criminal street gangs.

a. William S. DeFord, *The Dilemma of Expressive Punishment*, 76 U. Colo. L. Rev. 843 (2005). Reprinted with permission of the *University of Colorado Law Review*.

Speaking to the legislators, he said, "I think we need to send a message to these organized people that there isn't a place for them in Utah." The medium that Senator Fordham chose for this message was a sentence enhancement that increased the minimum sentence for crimes committed "in concert with two or more persons." It is common for legislators to say that the intent of a sentence enhancement or other punishment scheme is to "send a message." * * *

I. Why Punishment Must Be Expressive

* * *

A. Expressive Theories of Punishment

In 1929, A.C. Ewing wrote that rehabilitating criminals requires that we inflict suffering on them because the criminal [:]

> must realize the badness of what he has been doing, and since his previous actions make it very doubtful whether he will do so of his own accord, this badness must be "brought home to him" and the consciousness of it stamped on his mind by suffering. The infliction of pain is society's way of impressing on him that he has done wrong.

Punishments, then, should educate criminals and express the proper moral standing of criminal acts. It is significant that expressive theories use the word express and not communicate; the latter suggests a meeting of the minds, a communion between speaker and hearer. The word express, however, suggests a kind of force, descending from the Latin ex premere, meaning to press out, like pressing oil from an olive. Look again at the Ewing passage above. In describing punishment, he uses the words "stamped" and "impressing," both of which connote the same kind of downward force that expression in its original meaning possessed. If punishment is a kind of language, it is a language that depends on a vocabulary of force.

Even before A.C. Ewing wrote the article quoted above about how punishment should express moral condemnation, a handful of philosophers and legal theorists had suggested that punishments were or should be expressive. J.F. Stephen * * * argued that the criminal law should affirmatively seek to express the public's moral indignation aroused by crime. This moral indignation should not be discouraged but instead is perfectly legitimate and indeed should be ratified by the punishments we inflict. "[T]he whole criminal law is based on the principle that it is morally right to hate criminals." When the law inflicts a punishment, according to Stephen, it allows expression of hatred for and vindictiveness toward the criminal that would be inappropriate in other fora. The criminal law channels the public's revenge so that "the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." Similar to Stephen's version of expressive punishment, Henry M. Hart—quoting George K. Gardner—wrote that while physical hardships can come from many sources like wars and market

downturns, "[i]t is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment." Without some expressive element, then, punishment would be identical to any other physical hardship. * * *

In recent years, expressive theories of law have abounded, championed by Cass Sunstein, Richard McAdams, Robert Nozick, and Lawrence Lessig, to name a few. Each theorist describes a subtly different way that the law influences behavior by what it says. This Part examines one theory of expressive law, formulated by Dan M. Kahan. I have chosen Kahan's treatment of expressive law because it is a particularly cogent argument about punishment * * * instead of the expressive function of law generally.

B. Kahan and the Language of Punishment

Kahan's article, *What Do Alternative Sanctions Mean?*, explains why "[i]mprisonment is the punishment of choice in American jurisdictions," although "theorists of widely divergent orientations—from economics-minded conservatives to reform-minded civil libertarians—are united in their support for alternative sanctions." This disconnect between theory and practice, Kahan argues, exists because alternative sanctions, like community service or fines, lack the power to express condemnation in the same way that imprisonment can. Alternative sanctions too often express the wrong things. Fines, for example, express that "you may do what you have done, but you must pay for the privilege." Community service is ambiguous in what it expresses because it involves activities worthy of praise and admiration. Alternative sanctions are politically unacceptable because they represent a "mismatch between the suffering that a sanction imposes and the meaning that [the sanction] has for society."

* * * Kahan's solution? The rediscovery of shame. Shaming punishments have the benefits of other alternative sanctions—especially that they are less costly than imprisonment—but also, argues Kahan, shaming punishments "express appropriate moral condemnation," and thus are more politically acceptable than other alternative sanctions. The article does not say specifically how shaming punishments express condemnation, only that they do. To be fair to Kahan, however, the ability of shaming to express condemnation may be self-evident. Take the case of the woman who was ordered to wear a sign that read, "I am a convicted child molester." If this punishment was able to make the criminal feel ashamed, that shame resulted from some expression of condemnation implicit in the punishment. The criminal felt shame because she stood condemned by the community, in front of the community. * * *

Even if criminals are not ashamed by shaming punishments, the message is nevertheless out there, and the public's anger is assuaged. Kahan writes,

> [t]he public's realization that not all offenders view such punishments as disgraceful, however, does not diminish the resonance of either

shaming penalties or imprisonment as symbols of the community's moral disapproval. If anything, the perception that the offender is not shamed by what is commonly understood to be shameful would reinforce onlookers' conclusion that he is depraved and worthy of condemnation. * * *

II. Why Punishment Is Not Expressive

The messages that criminal punishments send are complex to the point of incoherence in three ways. First, the audiences of these messages are undefined and confused. Second, the speakers of the messages are complex, institutional speakers, obscuring the intents of the messages. And when the intent behind a message is confused, the message itself is confused. Third, the messages themselves are ambiguous, inconsistent, and sometimes contradictory. * * *

A. The Problem of Audience: To Whom Does Punishment Speak?

* * *

When Senator Fordham said, "I think we need to send a message to these organized people that there isn't a place for them in Utah," he seems to announce who the intended audience is for the message they are sending. "These organized people," he said. The punishment is intended to send a message to gang members. This presents several possibilities. First, the message could be intended for the recipients of the punishment, that is, the gang members who have been convicted of gang-related crimes and who will therefore serve the additional prison time required by the new law. Second, "these organized people" could be anyone who commits gang-related crimes, whether they have been caught and convicted or not. Third, the audience for the message could be all gang members. The message, then, would be designed to keep them from committing crimes. After all, Senator Fordham directs his message to "these organized people," which could mean any gang member. Fourth, the message could be directed to the public in general, to express the notion that their fears and their hostilities regarding gang activity are being vindicated. Further, the message could be to the public, telling them not to join gangs. But notice the structure of the legal formulation: the statute provides that crimes committed in concert with two or more persons merit a greater penalty than if the crime was committed alone. The law itself does not tell anyone not to join a gang or commit crimes in concert with others. It merely describes conditions under which the judge is constrained to hand down an enhanced punishment. The addressee of the statute is not any of those listed above, but instead the statute is addressed to judges and prosecutors. They are the ones who are expected to read the punishment legislation and act on it. As Drury Stevenson argues,

> most of the sanctions in our codebooks are to be meted out to citizen violators; but being the recipient of the punishment is not the same as being the addressee of the injunction to mete out the punishment. If a

military officer commands his men to shoot at the enemy, his men are the addressees, not the enemy, even though it is the enemy who is shot.

Although not the addressees, gang members may "overhear" a message sent from legislatures to judges and prosecutors, either by seeing a report of the new law in the newspaper or on television, by experiencing the punishment that the statute prescribes, or by observing a friend receive the punishment. But the legislature has no control over the message by the time the gang member receives it, or should receive it. The legislature is no longer sending any message, and the recipients of the message (judges and prosecutors), or those who "overhear" the message (the press, for example), now may not deliver the message to others in the way that the legislature intends. For example, the newspaper may criticize the new legislation for unfairly targeting low-income minors, undercutting the moral condemnation that members of the legislature seemed to intend. Or the judge could hand down the enhanced sentence with no accompanying explanation that the punishment was enhanced because the crime was gang-related. Again, no message of moral condemnation of gang activity is expressed to anyone but the judge and prosecutor. * * *

The audiences of punishment's messages are as complex as the messages, and as the complexity mounts, so does the message's ambiguity. Utterances are clearest when they are focused on a single addressee or class of addressees. The more they try to say different things to different people, the more the messages are confused. * * *

C. The Problems of Ambiguity and Inconsistency: What Does Punishment Say?

* * * The ambiguities of the messages of punishment come from two sources: first, the structural limitations of punishment as a kind of language, and second, the inconsistencies in the way that punishment is applied. * * * Unlike spoken or written languages which derive their meaning from shared understandings about what words and grammatical structures mean, there is no operative and shared understanding of what a prison sentence means. There is no dictionary to define it for us, no grammar to chart the relations between terms. * * * We are left, then, with many alternative reactions according to personal interpretations of what the punishment means.

The second source of ambiguity—inconsistencies in the way that punishment is applied—is the subject of the next two subsections. * * *

1. Inconsistency Between the Punishment and the Message

Punishment and the messages it seeks to send are often inconsistent because the means of punishment (force, violence, imprisonment, exacting fines, etc.) are similar to the actions the message seeks to condemn. * * * Punishments as mirror images of the crimes may have tremendous retributive value, but they lose the power to condemn those actions when the state undertakes them in response. Think of the confused message

that a child receives when she is spanked for hitting her brother. Whether or not the spanking is legitimate, the message is confusing because the moral status of hitting another person is problematized when the authority figure (here, the parent) simultaneously hits and condemns hitting. Whatever the moral differences between inflicting suffering as legal punishment and inflicting suffering as crime, to the convict, crime and punishment may look similar enough to send the opposite message than society intends to send. The similarities between crime and punishment send this message: that we as a society believe that it is appropriate, even necessary, to take people's lives, property, and autonomy by force, to make others suffer, to deprive them of their families, their privacy, and their human agency. These are cast as justified human actions. These are some of the messages of imprisonment, and they confuse, even contradict, any message that hopes to reinforce social norms against doing violence or infringing on the autonomy of others.

2. Inconsistencies Between Punishments

* * *

In 1984, Congress passed the Sentencing Guidelines and Policy Statements of the Sentencing Reform Act ("SRA"). The SRA was designed to "eliminate sentencing disparities and state[s] explicitly that race, gender, ethnicity, and income should not affect the sentence length." * * * Since the promulgation of sentencing guidelines, there has been increased scholarly scrutiny of racial, gender, and social class disparities in criminal sentencing. In a study promulgated by the U.S. Sentencing Commission, it was found that mandatory minimums actually worked against the most important goal of determinate sentencing. The Commission found that sentence enhancements actually promoted sentence disparity instead of alleviating it. This is because sentence enhancements do not eliminate discretion in sentencing; they merely shift the discretion from the judge to the prosecutor. If the prosecutor decides to pursue an enhancing factor and proves her case, the mandatory nature of the sentencing scheme means that the judge is bound to apply the enhancement. But the prosecutor often will not pursue the enhancement, or will only use it as a bargaining chip in plea bargaining. More damning, the study also found that sentence disparity under mandatory enhancement schemes was correlated with the race of the defendant. Sentences of white defendants were more likely to fall below mandatory minimums than those of black or Hispanic defendants. * * *

* * * Shawn D. Bushway and Anne Morrison Piehl, in a study of punishments under Maryland's sentencing guidelines, found that African Americans had twenty percent longer sentences than whites. "We find more judicial discretion and greater racial disparity than is generally found in the literature." Similarly, David B. Mustard found that "blacks, males, and offenders with low levels of education and income receive substantially longer sentences" than whites, females, and educated offenders.

If the studies are correct and if these punishments are meant to send a message, it is, among other things, a troubling message of racial, gender, and economic inequality. If punishment expresses condemnation, it says that African Americans and Latinos are more worthy of condemnation than whites even when their behavior is the same. If punishment offers an education in morals, as Jean Hampton argues, it teaches a morality of racial, social, economic, and gender hierarchies. Of course, some punishments send the opposite message, as when Martha Stewart was convicted and one of the jurors said that the verdict "sends a message to bigwigs in corporations.... They have to abide by the law. No one is above the law." My point here is not that punishments are always unequal and unjust. It is simply that because of the complexity of the messages that punishments send, in the aggregate, punishments send messages that most of us would not endorse. The complexity of punishment's social messages means that the messages are less predictable and coherent than we would like.

NOTE

In 2006, Professor Dan Kahan, who had previously supported the idea of shaming punishments, wrote, "The time has come for me to recant." Dan M. Kahan, *What's Really Wrong With Shaming Sanctions*, 84 Tex. L. Rev. 2075, 2075 (2006). Kahan explained that he had realized that shaming punishments send a message that social conformity is good and individuality bad, a message that is deeply at odds with the values of many Americans:

> [T]he aesthetics of shame seem inescapably to conjure up the specter of hierarchy and coerced conformity. This is especially true for the more ritualized forms of shaming. When a court orders a man convicted of harassing his ex-wife to permit her to spit in his face, as happened in one well-publicized case, the law announces, and invites members of the consuming public to infer, that the offender is contemptibly low in status. When a court orders an offender to engage in an abject form of public apology, it asserts, at least symbolically, the right of the community not just to impose disabilities on those who break the law, but also to force them to renounce their deviant values. For some, even milder publicity sanctions—the posting of the pictures of men convicted of soliciting prostitutes on billboards or internet sites—project a frightening image of the state self-consciously wielding the cudgel of public denunciation to cow reluctant individuals into obedience with communal norms.

Kahan, 84 Tex. L. Rev. at 2088. Kahan now believes that imprisonment is a better punishment because it permits people with many different value systems to embrace it for different reasons:

> An immensely rich and ambiguous institution, imprisonment not only condemns, but condemns in a multiplicity of registers that make it simultaneously agreeable to persons of diverse cultural outlooks: hierarchists can see it as supplying a delicious form of debasement for those who resist their proper place in the social order; communitarians, a fitting gesture of banishment for those who wrongfully renounce social obligation; individualists, a reciprocal deprivation of liberty for those who

> fail to respect the liberty of others; and egalitarians, a uniquely democratic metric of punishment for persons who enjoy value by virtue of their capacity for autonomy. Neither the ascendancy of imprisonment nor its stubborn persistence can be understood without an appreciation of the political advantages it has enjoyed over rival forms of punishment by virtue of its expressive overdetermination.

Id. at 2089–90.

Although Kahan has recanted, other advocates support a different theory of criminal justice that involves shame: "restorative justice," which involves the idea of "reintegrative shaming." For more on restorative justice, see Chapter 15.

C. THE PRESUMPTION OF INNOCENCE AND PROOF BEYOND A REASONABLE DOUBT

In American litigation, criminal trials begin with the prosecution's attempt to establish the defendant's guilt. The reason why the prosecution goes first in a trial is the presumption of innocence, which has been described by the Supreme Court as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The formal way of saying that the prosecution has the responsibility for establishing the defendant's guilt—rather than the defendant having the responsibility for establishing his or her innocence—is that in a criminal case, the prosecution bears the *burden of proof*.[a]

The *standard of proof* in litigation describes the level of certainty the fact-finder must reach before ruling for the party with the burden of proof. In an American criminal trial, the prosecution's standard of proof is "beyond a reasonable doubt." This is the most difficult standard of proof to meet in American law; in civil cases, in contrast, the standard is usually "a preponderance of the evidence," meaning "more likely than not."

Why is the burden of proof in a criminal trial so onerous? In *Winship*, the Supreme Court set forth some reasons for placing such a heavy burden on the government:

> The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. * * * "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be

a. There are two types of burdens of proof: the *burden of production* and the *burden of persuasion*. The burden of production is the initial responsibility to produce evidence in support of a claim. The burden of persuasion is the ultimate responsibility of proving that a given offense was committed or that the elements of an asserted defense are either present (the defendant's position) or absent (the prosecutor's position). In a criminal case, the burden of persuasion as to charged offenses always rests with the prosecution. The burden of persuasion as to a defense may rest with the prosecution or the defendant, depending on the type of defense asserted. For simplicity's sake, however, it is common to speak of the "burden of proof."

adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. * * *

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. * * *

The reasonable doubt standard is not just a good idea; it is the law. In *Winship*, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

Because the prosecution always retains the burden of proof beyond a reasonable doubt in order to secure a conviction, one possible defense strategy is simply to create a reasonable doubt about some element of the crime. This kind of strategy is sometimes described as a *case-in-chief* defense, or a *prima facie* case defense. Suppose, for example, that the defendant has been charged with theft, and one element of that crime is the intentional taking of the property of another. By simply creating a reasonable doubt about whether the taking was intentional or merely accidental, the defense can win and the defendant can be acquitted. This kind of defense may not require the introduction of any evidence; it requires only that the defendant "poke holes" in the prosecution's story.

However, a second strategy is also available to the defense: admitting the basic crime, but arguing for acquittal based on extenuating circumstances. For instance, the defendant can admit that she took the victim's property, but argue that the taking was justified: she stole the victim's fire extinguisher in order to put out a fire that would have otherwise killed an entire family of innocent people. Or, the defendant can admit she stole the property, but argue that she should nevertheless be excused from criminal punishment: she believed the fire extinguisher was actually a transmission device for messages from Saturn, and that she needed to receive and translate these messages in order to save the Earth. This kind of defense—in which the defendant admits guilt as to the charged offense, but claims she nevertheless should be acquitted of that offense either because she was justified in acting the way she did or because she should be

excused—is called an *affirmative defense.* In contrast to the burden of persuasion for the case in chief, which always remains on the prosecution as a matter of constitutional law, the legislature may place the burden of persuasion regarding an affirmative defense on the defendant. In such a case, the defendant has the responsibility to prove the elements of any justification or excuse defense[b] he or she asserts at trial. In situations in which the legislature has allocated the burden of persuasion to the defendant, the defendant is usually required to prove the affirmative defense by a preponderance of the evidence, the same standard used in civil trials.

What does "reasonable doubt" mean? Consider the following model jury instructions.

DISTRICT OF COLUMBIA CRIMINAL JURY INSTRUCTIONS

Instruction 2.09
REASONABLE DOUBT
4th ed., Young Lawyers Section, Bar Association of the District of Columbia, 1993

Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause you, after careful and candid and impartial consideration of all the evidence, to be so undecided that you cannot say that you are firmly convinced of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

CALIFORNIA JURY INSTRUCTIONS—CRIMINAL

2.90. Presumption of Innocence–Reasonable Doubt–Burden of Proof
7th ed., West, 2003

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

b. The distinction between justifications and excuses is discussed in Chapter 10.

D. STANDARDS OF REVIEW

Before a criminal trial has ended, at the close of the prosecution's case in chief, a defendant may move for a "directed verdict" of acquittal, in which the judge directs the jury to acquit for lack of evidence. After the trial is completed, if the defendant is convicted, he or she may appeal the conviction to a higher court for review of the sufficiency of the evidence. What standard of proof should the trial judge apply to a motion for directed verdict? What standard of proof should an appellate court apply when reviewing the evidence supporting a conviction?

It may be surprising, at first glance, to learn that in these situations the trial judge and the appellate judge or judges do not apply the reasonable-doubt standard. Instead, the *standard of review* is a more complex one. On a motion for a directed verdict, the trial judge asks herself or himself, not whether the prosecution has proved its case beyond a reasonable doubt, but whether the prosecution has introduced sufficient evidence such that a rational jury *could* decide that the prosecution has proved its case beyond a reasonable doubt. On an appeal based on the sufficiency of the evidence, the question for the appellate court is, again, not whether the prosecution has proved its case beyond a reasonable doubt, but rather whether a rational jury *could have*, on the evidence presented, found the defendant guilty beyond a reasonable doubt. These standards suggest that when the trial court is deciding whether to free the defendant without the jury's input or in spite of the jury's belief that the defendant should be convicted, the appellate court will give the prosecution, not the defendant, the benefit of the doubt. The following case helps illuminate this counter-intuitive standard of review.

CURLEY v. UNITED STATES

United States Court of Appeals, District of Columbia
160 F.2d 229 (D.C. Cir. 1947)

PRETTYMAN, ASSOCIATE JUSTICE.

Appellants were indicted for violation of the mail fraud statute and for conspiracy to violate that statute. Trial was had before a jury. At the conclusion of the case for the prosecution, the defendants moved for directed verdicts of acquittal. The court denied the motions. Defendants Curley and Fuller stood on the motions and offered no evidence. Defendant Smith presented eight character witnesses and proffered certain documentary evidence. These three defendants were convicted on the conspiracy count. * * * The appeals were consolidated for argument.

[Curley and the other defendants were members of "the Group," a business organization involved in government procurement for housing and defense-related contracts.]

* * * In the negotiation of the contracts, representations were made in the name of the Group as to business controlled by it, its staff, its

assets, and the existing status of various government projects. The money was received by the Group under agreements that it be held as deposits and returned if contemplated business projects did not materialize. The representations were false, and the agreements were not kept, except that three refunds were made from funds paid in by other people. The Group was represented as having within its control the designation of contractors on certain government housing projects and war work. It had none. It represented [itself] as having large amounts of cash in bank and extensive security holdings. It had no such amounts or holdings. Certain housing projects were represented as having been approved by the Federal Housing Administration. They had not been. Commitments on financing were represented as having been made by financial institutions on certain projects. No such commitments had been made. These various representations were inducements for the contracts made by the Group with its customers or clients. They were made verbally, in letters, in contract agreements, and in a brochure widely distributed. The money received as deposits was not held but was spent as received. * * *

[Curley's claim at trial was that, although he served as President of the Group, there was no proof that he was involved in any significant way in the fraudulent activities of the Group.]

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond

reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty. * * *

The crucial question at this point seems to us to be whether [Curley] knew of the wrongful acts being committed in the name of the Group. Because, if he knew, reasonable minds might fairly conclude that he must necessarily have been a participant in the scheme, i.e., a conspirator; that no other hypothesis is consistent with that knowledge and his acts. Was such knowledge on his part a legitimate inference from the proven facts? It seems to us that it was. He was president of the corporation. He was frequently in its offices. He introduced customers. He personally attempted to arrange with a bank for a "loan" which was to be left on deposit, a sham depiction of financial substance. The misrepresentations made by the Group were total, not incidental or occasional. They were made not to occasional customers or clients but to all of them. The misrepresentations were not as to whether a group, in control of certain contracts, was also in control of others; this Group had control of no contracts whatever. The misrepresentations were not as to incidents of the staff and organization of the Group; it had no staff worthy of the name. The Group did not have funds which it might legitimately use for operating expenses and, by inadvertence or misconduct of an individual, dip into other funds which it was obligated to hold on deposit; it had no funds whatever, other than the deposits. Occasional, incidental or partial misrepresentation or misappropriation by one officer of a corporation may be unimpressive as a basis for imputing knowledge to another officer; but total misrepresentation of the corporate affairs and total diversion of funds is substantial ground for an inference of knowledge on the part of an active and experienced president. The jury might fairly and legitimately infer as a fact from the proven facts that Curley knew of the wrongs being committed. As we have said, if he knew, his proven activities with and on behalf of the Group might fairly lead, if not compel, reasonable men to conclude that he must necessarily have been a participant in the plans of the Group. It cannot be said that upon all this evidence reasonable minds must necessarily doubt that Curley was a participant in the activities of the Group. * * *

The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much might be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead, that he had complete faith in Fuller, that he never asked any questions, that he

was never informed as to the contents of contracts with customers or the financial statements or the use of the money; in short, that it was possible that he was as much put upon as were the customers. If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury. If we ourselves doubted Curley's guilt, that doubt would be legally immaterial, in view of the evidence and the rule of law applicable. However, we think it proper to add, under the circumstances of the case, that to us, as to the jury, there is no doubt. * * *

Affirmed.

WILBUR K. MILLER, ASSOCIATE JUSTICE (dissenting).

It is my view that the jury should have been instructed to find the appellant, James M. Curley, not guilty. The wrongs were done by Fuller. Curley made no representations to anybody. He did not participate in negotiations with customers. He signed no letters, executed no contracts. He did not know of the brochure or the financial statement. He received no money or other thing of value. All this is admitted, even recited, in the court's opinion.

Whether Curley was guilty depended therefore, on whether he knew of the wrongful acts being committed in the name of the Group. That, the court correctly says, is the crucial question with respect to him. There was no criminal intent if he did not know. If he knew, then it would follow that he had become a conspirator with Fuller. But the evidence of knowledge must be clear, not equivocal.

It is true, of course, that whether Curley had knowledge of Fuller's wrongdoing could not be proved directly, but could only be inferred from what Curley did. Nevertheless, the presumption of innocence insists that there be no equivocation in that proof. As always, it must convince beyond a reasonable doubt. If it be not of that quality, if it be not clear but equivocal, then the jury must not be permitted to speculate that the defendant is guilty. * * *

To prove guilt beyond a reasonable doubt does not mean merely to prove certain facts which are as consistent with innocence as guilt. To me the expression means to submit evidence which produces in the minds of the jurors an abiding and conscientious conviction, to a moral certainty, that the accused is guilty. I am aware of the fact that his classic paraphrase of proof beyond a reasonable doubt by Chief Justice Shaw of Massachusetts has been criticized of late, but I do not agree with the critics. Reasonable doubt is not eliminated by evidence from which the jury may draw either of two irreconcilable inferences. * * *

E. THE ROLE OF THE JURY

The jury plays an influential role in the criminal justice system.[a] The Sixth Amendment to the U.S. Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." This means that unless the defendant waives his or her right to a jury trial and elects to be tried by a judge, his guilt or innocence will be determined by a jury of twelve individuals.[b]

Although the judge gives jurors detailed instructions on the law they are supposed to apply to the case, the jury is not strictly obligated to follow the law. If the jury acquits the defendant even in the face of overwhelming evidence of guilt, the judge is not permitted to punish the jury nor can the judge overturn the jury's not guilty verdict. The act of returning a verdict contrary to law is called *jury nullification.*

A longstanding debate exists over whether jurors should be informed of their power to nullify. On the one hand are individuals who, like the members of the Fully Informed Jury Association (FIJA), believe that jurors should be informed of their power to ignore the law so that justice can be done in all cases, not simply in the cases in which a member of the jury happens to know of the nullification power and tells his fellow jurors. FIJA members have shown up on the steps of courthouses, passing out leaflets informing potential jurors of their power to bring in a verdict of conscience when they find that a law is objectionable, unjust or unfair.

On the other hand are individuals who believe that jury nullification threatens the rule of law and invites chaos. According to these individuals, if jurors feel they are free to reach any verdict they choose regardless of the law, jury verdicts are likely to produce widely disparate treatment for similarly situated defendants.

In 1995, George Washington University law professor Paul Butler ignited a new debate in the nullification arena when he suggested in the Yale Law Journal that African American jurors should engage in racially based jury nullification in cases involving African American defendants charged with non-violent crimes. An excerpt from one of Professor But-

a. The importance of jury decision-making has been reaffirmed in several recent cases. In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court ruled that the constitutional right to a trial by jury includes the right to have the jury decide any fact, other than the fact of a prior conviction, that increases the penalty for the crime beyond the prescribed statutory maximum. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court extended the rule of *Apprendi* by holding that juries, not judges, must decide any and all facts leading to the imposition of the death penalty.

b. In the federal courts and in most state courts, the defendant is tried before a jury of 12 persons and the jury's verdict must be unanimous. If the jury cannot come to a unanimous verdict, the judge will declare a mistrial due to a hung jury and the prosecutor may either re-file charges or drop the case. Some states permit non-unanimous verdicts. Some states permit juries to be comprised of less than twelve persons. The Supreme Court has upheld the use of non-unanimous jury verdicts and juries of less than twelve persons. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972). If, however, a six-person jury is used, its verdict must be unanimous. Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).

ler's subsequent writings as well as a powerful response by Andrew Leipold follow *People v. Williams*, a case in which the California Supreme Court had to decide whether a trial judge acted properly when he discharged a juror who admitted that he was uncomfortable convicting an 18–year–old male defendant of statutory rape for having what the defendant claimed was consensual sex with his 16–year–old girlfriend. If the jury has the power to acquit even in the face of overwhelming evidence of guilt, is it fair for a judge to discharge a juror who seems inclined to exercise this power?

PEOPLE v. WILLIAMS

Supreme Court of California
25 Cal.4th 441, 21 P.3d 1209, 106 Cal.Rptr.2d 295 (2001)

GEORGE, C.J.

* * * [T]he charges in this case arose from three incidents involving defendant and his former girlfriend. Only the first incident is relevant to the issue upon which we granted review.

At the time of the December 31, 1994, incident, defendant was 18 years of age and his girlfriend, Jennifer B., was 16 years of age. Both defendant and Jennifer B. testified that they engaged in sexual intercourse on that date; however, defendant testified it was consensual, and Jennifer B. testified defendant forced her to engage in intercourse by threatening her with knives.

At trial, prior to the attorneys' closing arguments, the court indicated that it would instruct the jury that it could convict defendant of unlawful sexual intercourse with a minor as a lesser offense included within the charged offense of rape. Defendant's objection was overruled.

During argument, defense counsel made the following statement: "Something else has happened in this case.* * * They have added misdemeanors to all the charges you heard. They added statutory rape suddenly without notice or preparation. Now, what is the role of a juror on the statutory misdemeanor rape? Your role as a juror is to fairly apply the law. That's why we don't want computers. We need the input of fair people, [defendant]'s peers, if you will. Law as you know is not uniformly applied. I can see five cars speeding and the highway patrol is not likely to arrest any of the five. Mores, custom[s] change. Times change. And the law must be applied fairly. So if the law is not being applied fairly, that's why you need fair jurors. Now there is a case called *Duncan versus Alaska*. It's the Supreme Court of the United States. And I would like to read to you just two lines: 'The guarantee of jury trial in the federal and state Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government.' And further on in the case at the end are the lovely words,

'A jury may, at times, afford a higher justice by refusing to enforce harsh laws.' Please understand."[2]

During the first day of deliberations, the trial court received a message from the jury foreperson indicating that Juror No. 10 "refuses to adhere to Judge's instruction to uphold the law in regard to rape and statutory rape, Section 261.5(b) of the Penal Code. He believes the law is wrong and, therefore, will not hear any discussions." In response, the trial court questioned Juror No. 10 outside the presence of the other jurors:

THE COURT: [I]t's been reported to me that you refuse to follow my instructions on the law in regard to rape and unlawful sexual intercourse, that you believe the law to be wrong and, therefore, you will not hear any discussion on that subject. Is that correct?

[JUROR]: Pretty much, yes.

THE COURT: All right. Are you governed by what was said during argument by counsel?

[JUROR]: Yes.

THE COURT: You understand that there was an improper suggestion and that it's a violation of the Rules of Professional Conduct?

[JUROR]: No, I don't know that.

THE COURT: All right. Well, I'm telling you that's what it was. And I would remind you too that you took an oath at the outset of the case in the following language: 'Do you and each of you understand and agree that you will well and truly try the cause now pending before this Court and a true verdict render according only to the evidence presented to you and to the instructions of the Court.' You understand that if you would not follow the instructions that have been given to you by the court that you would be violating that oath? Do you understand that?

[JUROR]: I understand that.

THE COURT: Are you willing to abide by the requirements of your oath?

[JUROR]: I simply cannot see staining a man, a young man, for the rest of his life for what I believe to be a wrong reason.

THE COURT: Well, you understand that statutory rape or unlawful sexual intercourse has been described to you as a misdemeanor? Did you follow that in the instructions?

[JUROR]: I've been told it is a misdemeanor. I still don't see—if it were a $10 fine, I just don't see convicting a man and staining his record for the rest of his life. I think that is wrong. I'm sorry, Judge.

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2. The language quoted by defense counsel actually is from the decision in *Duncan v. Louisiana*. The "lovely words" quoted by defense counsel appear in Justice Harlan's dissenting opinion. Defense counsel did not quote the parenthetical phrase following those words, which raises concerns about the concept of juror nullification: "A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths)."

THE COURT: What you're saying is not the law either concerning that particular aspect.

[JUROR]: I'm trying as best I can, Judge. And I'm willing to follow all the rules and regulations on the entire rest of the charges, but on that particular charge, I just feel duty-bound to object.

THE COURT: So you're not willing then to follow your oath?

[JUROR]: That is correct.

The trial court, over defendant's objection, excused Juror No. 10, replaced him with an alternate juror, and instructed the jury to begin its deliberations anew. The next day, the jury convicted defendant of the above described charges, including unlawful sexual intercourse with a minor.

III

A trial court's authority to discharge a juror is granted by Penal Code section 1089, which provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor [sic], the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." "We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. If there is any substantial evidence supporting the trial court's ruling, we will uphold it." * * *

A juror who refuses to follow the court's instructions is "unable to perform his duty" within the meaning of Penal Code section 1089. As soon as a jury is selected, each juror must agree to render a true verdict " 'according only to the evidence presented . . . and *to the instructions of the court.*' " * * *

Defendant contends, however, that the trial court's order denied him his right to trial by jury, because Juror No. 10 properly was exercising his alleged right to engage in juror nullification by refusing to follow the law regarding unlawful sexual intercourse with a minor. But defendant has cited no case, and we are aware of none, that holds that a trial court violates the defendant's right to a jury trial by excusing a juror who refuses to follow the law. The circumstance that, as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions.

It long has been recognized that, in some instances, a jury has the ability to disregard, or nullify, the law. A jury has the ability to acquit a criminal defendant against the weight of the evidence. A jury in a criminal

case may return inconsistent verdicts. A court may not direct a jury to enter a guilty verdict "no matter how conclusive the evidence." * * *

The jury's power to nullify the law is the consequence of a number of specific procedural protections granted criminal defendants. Chief Justice Bird, quoting Judge Learned Hand's description of jury nullification as the jury's " 'assumption of a power which they had no right to exercise, but to which they were disposed through lenity,' " observed: "This power is attributable to two unique features of criminal trials. First, a criminal jury has the right to return a general verdict which does not specify how it applied the law to the facts, or for that matter, what law was applied or what facts were found. * * * Second, the constitutional double jeopardy bar prevents an appellate court from disregarding the jury's verdict in favor of the defendant and ordering a new trial on the same charge." The United States Supreme Court has referred to the ability of a jury in a criminal case to nullify the law in the defendant's favor as "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons."[6]

But the circumstance that the prosecution may be powerless to challenge a jury verdict or finding that is prompted by the jury's refusal to apply a particular law does not lessen the obligation of each juror to obey the court's instructions. More than a century ago, the United States Supreme Court recognized that jurors are required to follow the trial court's instructions. * * *

This view has deep roots. In 1835, in *United States v. Battiste*, Justice Story, sitting as a circuit justice, instructed the jury in a criminal case that they were the judges of the facts, but not of the law, stating: "[T]hey have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury.

6. A jury is able to nullify the law only under certain limited circumstances. In a civil case, the jury's ability to nullify a law is sharply curtailed. The court may direct the jury in a civil case to enter a particular verdict, and a verdict that is not supported by substantial evidence or is contrary to the law may be vacated on a motion for new trial or the resulting judgment may be reversed on appeal. Even in a criminal prosecution, the jury's ability to nullify the law is limited when it acts to the defendant's detriment. If the evidence is "insufficient to sustain a conviction," the court "shall order the entry of a judgment of acquittal." A verdict convicting a defendant that is not supported by substantial evidence, or is contrary to law, may be vacated on a motion for new trial, or the resulting judgment may be reversed on appeal.

Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was. * * * Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it."

In *United States v. Powell,* the high court reaffirmed the rule that verdicts in a criminal prosecution need not be consistent but, at the same time, the court recognized that jurors are obligated to follow the law. * * * The court explained the rule permitting inconsistent verdicts in criminal cases "as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." (*Ibid.*; see also *Williams v. Florida* ["The purpose of the jury trial ... is to prevent oppression by the Government.... Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence"].) * * *

[I]t is important not to encourage or glorify the jury's power to disregard the law. While that power has, on some occasions, achieved just results, it also has led to verdicts based upon bigotry and racism.[9] A jury that disregards the law and, instead, reaches a verdict based upon the personal views and beliefs of the jurors violates one of our nation's most basic precepts: that we are "a government of laws and not men."

The only case cited by the parties or that we have found that has addressed the specific issue raised in the present case—i.e., whether a trial court may remove a juror who discloses, during jury deliberations, that he or she will not apply the law as instructed by the court—is *U.S. v. Thomas,* involving a prosecution for violation of federal narcotics laws. In *Thomas,* pursuant to the provisions of rule 23(b) of the Federal Rules of Criminal Procedure permitting the court to dismiss a juror for "just cause" and have a verdict returned by the remaining 11 jurors, a juror was dismissed during deliberations. The court of appeals held "that—as an obvious violation of a juror's oath and duty—a refusal to apply the law as set forth by the court constitutes grounds for dismissal under Rule 23(b)." Restating "some basic principles regarding the character of our jury system," the Court of Appeals concluded: "Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the

9. Jury nullification includes "acquittals by all-white, southern juries of white defendants who killed, assaulted, or harassed civil rights activists or African Americans generally." As one federal circuit court has observed:

[A]lthough the early history of our country includes the occasional *Zenger* trial or acquittals in fugitive slave cases, more recent history presents numerous and notorious examples of jurors nullifying—cases that reveal the destructive potential of a practice Professor Randall Kennedy of the Harvard Law School has rightly termed a "sabotage of justice." Consider, for example, the two hung juries in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till—shameful examples of how nullification has been used to sanction murder and lynching.

court.... We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent."

The court in *Thomas* added: " 'A jury has no more "*right*" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.' "

Although the court in *Thomas* ultimately concluded that the trial court in that case had erred in dismissing the juror in question, because the record suggested that the juror's views may well have been motivated by doubts about the defendant's guilt rather than by an intent to nullify the law, the *Thomas* opinion left no doubt that when the record does establish that a deliberating juror is unwilling to apply the law as instructed by the court, "a juror's purposeful disregard of the law as set forth in the court's instruction may constitute just cause for that juror's removal under Rule 23(b)." * * *

In the present case there is ample evidence in the record to support the trial court's finding that Juror No. 10 was unable to perform his duties as a juror. The juror stated that he objected to the law concerning unlawful sexual intercourse and expressly confirmed that he was unwilling to abide by his oath to follow the court's instructions. The juror's inability to perform his duties thus appears in the record "as a demonstrable reality." The trial court acted properly in excusing Juror No. 10 on this basis.

IV

Jury nullification raises issues that go to the heart of our constitutional form of government. These issues sometimes arise when defendants, as a matter of conscience, choose to violate laws as a means of protest, or to violate laws they view as unjust. Such cases cause us to examine the meaning of the cherished right to trial by jury.

It is striking that the debate over juror nullification remains vigorous after more than a hundred years. But it is equally significant that, during this time, no published authority has restricted a trial court's authority to discharge a juror when the record demonstrates that the juror is unable or unwilling to follow the court's instructions.

"Championing a jury's refusal to apply the law as instructed is inconsistent with the very notion of the rule of law. As the young Abraham Lincoln said in a related context, 'let me not be understood as saying there are no bad laws, or that grievances may not arise for the redress of which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example, they should be religiously observed.' "

Encouraging a jury to nullify a law it finds unjust or to act as the "conscience of the community" by disregarding the court's instructions may sound lofty, but such unchecked and unreviewable power can lead to verdicts based upon bigotry and racism. Jurors who do not feel bound to follow the law can act capriciously, to the detriment of the accused. In addition to refusing to follow laws they view as unjust, such jurors could choose to disregard instructions mandated by the Legislature not to read media accounts of the trial, not to discuss the case with others, or not to conduct their own investigation by visiting the crime scene. The jury might feel free to ignore the presumption of innocence or find the defendant guilty even though some jurors harbor a reasonable doubt. A jury might disregard an instruction not to draw an inference from the exercise of a privilege and assume the defendant must be guilty if he or she chooses not to testify. In a capital case, a juror could vote to impose the death penalty without considering mitigating evidence. Some jurors might decide not to view a defendant's confession with caution or not require corroboration of the testimony of an accomplice. A jury even might determine that deliberations are too difficult and decide the defendant's guilt by the flip of a coin.

These are just a few of the many instructions required by the Legislature that a juror might choose to ignore if encouraged to nullify the law.

Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. As one commentator has noted: "When jurors enter a verdict in contravention of what the law authorizes and requires, they subvert the rule of law and subject citizens—defendants, witnesses, victims, and everyone affected by criminal justice administration—to power based on the subjective predilections of twelve individuals. They affect the rule of men, not law." A nullifying jury is essentially a lawless jury.

We reaffirm, therefore, the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law. A juror who is "unable or unwilling to do so is unable to perform his [or her] duty" as a juror and may be discharged.

V

The judgment of the Court of Appeal is affirmed.

RACE-BASED JURY NULLIFICATION: CASE-IN-CHIEF

Paul D. Butler
30 J. Marshall L. Rev. 911 (1997)

* * *

I was a Special Assistant United States Attorney in the District of Columbia. I represented the United States of America and used that

power to put African–American people in prison. Like a lot of prosecutors, that pretty much was my job description. While at the U.S. Attorney's Office, I saw and did things that profoundly changed the way that I viewed my work as a prosecutor and my responsibilities as an African–American man.

* * * The reality is this: as we speak, one-third of African–American young men are under criminal justice supervision. The reality is that, as we speak, over half of the women in state prison are African–American and over half of the men in federal and state prisons are African–American.

My journey took me to the academy. I teach criminal law. My students learned that prison is for people who are the most dangerous and the most immoral in our society. Is there anyone here who really believes that over half of the most immoral and dangerous people in the United States are African–American when they constitute only 12 percent of the population? When I look at those statistics, I think that punishment, prison, and criminal law have become the way that we treat the problems of the poor, especially poor African–American people. I think that is immoral. I am confident that one day we, as a society, will understand that, but African–American people cannot afford to wait that long. If the present rate of incarceration of African–Americans continues, by the year 2010 the majority of African–American men between the ages of 18 and 40 will be in prison, the majority.

Now, to prevent that kind of "just us" justice, I advocate a program of black self-help outside and inside the courtroom. Outside the courtroom self-help includes the kind of community-building efforts that many of us are already engaged in: mentoring, tutoring, after-school programs, providing legal and medical care to the poor, working with inmates, and taking better care of our families. * * * Inside the courtroom self-help includes the responsible use of prosecutorial discretion, especially by black prosecutors. It also includes selective jury nullification for victimless crimes. I am going to spend the balance of my time talking about selective jury nullification because it is part of my solution to the unfairness in the criminal justice system.

* * * According to the Department of Justice, for virtually every crime African–Americans are disproportionately arrested, prosecuted, convicted and imprisoned.

That is true of murder, manslaughter, rape, drug possession, drug distribution, theft and gambling. Why is that? Why do African–Americans commit so many crimes, or do they really? Maybe it is just discrimination that accounts for this apparent disproportionate black criminality. To give you a sense of the justice of selective nullification, I am going to describe quickly two racial critiques of American criminal justice: a liberal critique, and one that I call radical, although the radical critique is made by a lot of people who do not think of themselves as radical.

First, I will discuss the liberal racial critique of American justice. According to the critique, American criminal justice is racist because it is controlled primarily by white people who are unable to escape the culture's dominant message of white supremacy. Therefore, white people are inevitably, even if unintentionally, prejudiced. These white actors include legislatures, police, prosecutors, judges and jurors. These white actors exercise their discretion to make and enforce the criminal law in a discriminatory fashion.

Sometimes this discrimination is overt, as in the case of people like Mark Fuhrman or the police officers who beat up Rodney King. Sometimes it is unintentional, such as a white juror who invariably credits the testimony of a white witness over a black witness. I think that the most persuasive case for the liberal critique is with drug cases. According to the Department of Justice, black people do not commit any more drug offenses than whites. They are about 12 percent of drug offenders, which is exactly proportionate to their share of the population. Now, I know this does not surprise all of you who have been on college campuses, and if you think about it, it is probably consistent with our knowledge of the real world, too. * * *

The Department of Justice agrees, and the conclusion is borne out by statistics. But get this: of people who are incarcerated for drug use, African–Americans are more than 70 percent. African–Americans are 12 percent of the offenders, but 74 percent of the people locked up for the offense. That sounds like discrimination, and when I talk to my police and prosecutor friends, they agree that it is a kind of discrimination. However, many make the argument that it is discrimination that is good for the black community: it is more law enforcement, which is a good thing. When I talk about my proposal for nullification, we will come back to that idea. For now, understand that I think that drug offenses are the best argument for the liberal critique on American criminal justice.

However, I mentioned another critique, one that I called radical. What is this critique? What is the radical critique of why there are so many more blacks in prison than whites and other minorities? The radical critique does not discount the role of discrimination in accounting for this racial disparity, but it also does not say that most or all of the blame is due to discrimination. It offers a more structural fundamental explanation for black crime. * * *

* * * The answer to why there is so much black crime is rooted more in sociology than in either psychology or biology. Prominent American criminologist Norval Morris says that "an adverse social and subcultural background is statistically more is criminogenic than psychosis." How about that? So, unsurprisingly then, virtually all of the sociological theories predict high levels of African–American criminal behavior. A short quote, if you will indulge me, from Michael Tonry:

> Crime by young disadvantaged black men [does not] result primarily from their individual moral failures but from their misfortune of

being born in places and times and under circumstances that make crime, drug use and gang membership look like reasonable choices, choices from a narrow range of not very attractive options.

* * * One interesting thing is what the liberal and the radical critiques do not say. They do not say that prison is a bad place for every African–American criminal. Rather, liberal critics tend to say that law enforcement in the white community should be leveled up to law enforcement in the black community. For example, white communities should have the same kind of police presence. * * * Alternatively, these critics might say that law enforcement should be leveled down in black communities. For example, the government should not prosecute black drug users and sellers any more than it prosecutes white or Asian–American or Latino drug users and sellers.

Our radical critics, on the other hand, might encourage incarceration of African–Americans when it has some proven social benefit, some utilitarian benefit, usually like rehabilitation or incapacitation or sentencing with a proven deterrent effect. This is an important point because one almost never hears any racial critic saying that black murderers or rapists or child abusers should not be punished. That includes African–American jurors who engage in jury nullification. In fact, in my experience, black jurors are happy to send violent black criminals to prison, because these jurors, like most jurors, have good sense. It is almost always in the interests of the community to isolate dangerous people, even if the reason those people are dangerous might be due to circumstances beyond their control.

What are the costs to the black community of so much law enforcement? What are the costs of having one out of three of our young men under criminal justice supervision? Racial critics identify many costs: economic and social costs, including the lack of a black male presence particularly in the African–American community; the lack of male role models and male income; the perceived dearth or the lack of marriage-eligible African–American men, among others. So when we start talking about specific cases in which nullification would occur, I will mention drug cases as one great example. You might say, "Well, that's not a victimless crime." I ask you to keep in mind that law enforcement is also not victimless. Law enforcement also has opportunity costs.

* * * Nullification is a partial cure that I come to reluctantly and for moral reasons. To me it is not enough to say that there is a power to nullify; there also has to be some moral basis for this power. In the article I make several moral claims as to the power. * * * I am going to quickly tell you about two.

One is this phenomenon of democratic domination. It is a critical race concept. The reason why I believe that African–American jurors have a moral claim to selective nullification is based on this idea that they do not effectively have a say; they do not have the say that they should in the making of the law. They are the victims of the tyranny of the majority.

* * * Let me tell you how it works in the context of the criminal justice system. With every crime bill, the Black Political Caucus—the national one or the one in the state—will make the argument, "Hey, guys, instead of spending all this money building prisons, let's spend some money on rehabilitation, on job training, on education. Those are the root causes of crime." In the Black Political Caucus' belief, the white majority will just say no. It will be legislated away, as we saw happen in the two most recent crime bills. That is always the case. * * * We know that there are better ways to stop crime than prison building, including, for example, financial incentives for kids to stay in school. Rand Corporation released a report that said you prevent more crime per dollar spent by giving kids money to stay in school than you do by building prisons.

The second most powerful way to stop crime is parental training, teaching some of these kids who are having babies how to be good parents. Studies show that such training prevents more crime than the deterrent effect of prison. Now, that does not shock a lot of you. It does not shock a lot of legislators either, but, unfortunately, the majority seems to prefer the punishment regime. We have certainly seen that with powder cocaine versus crack cocaine today. You all know the disparity: you get the same punishment for one gram of crack that you get for 100 grams of powder.[a] A lot of African–Americans and other people thought that that was unfair. The political majority's response to the African–American community was, "Well, if you don't like racially biased disparity, don't acquit crack dealers; what you ought to do is change the law." The way you change the federal sentencing law is to lobby the U.S. Sentencing Commission. At least that is the way you always did it before this proposal for jury nullification.

The Sentencing Commission was lobbied by civil rights groups, and they agreed that that disparity was unfair. They recommended to the U.S. Congress and to the President that the crack-versus-powder disparity be changed. However, for some reason the U.S. Congress and the President, Bill Clinton, just said no. They preferred the punishment regime. Again, this is typical when it comes to the way lawmakers deal with the criminal justice system as it applies to African–Americans. "Democratic domination" is Derrick Bell's name for it, and for me it is a moral reason as to why nullification is appropriate.

The third moral claim African–Americans have to the power of jury nullification is what I call the symbolic role of black jurors. If you look at Supreme Court cases, they often have the occasion to discuss black jurors. They do so because of our country's sad history of excluding black people from juries. The Court said that is a bad thing because black jurors serve this symbolic function. Essentially they symbolize the fairness and the impartiality of the law. The Court says that excluding black jurors undermines public confidence in the criminal justice system. The Court

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a. Butler refers to the extreme federal punishment differential between possession of powder cocaine and possession of crack cocaine that existed prior to 2008. *See, e.g.*, U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1994). For a discussion of a similar punishment regime in the state of Minnesota, *see State v. Russell* in Chapter 2.

has also found that black jurors are especially important in race-related cases.

* * * What about an African–American juror who endorses racial critiques of the American criminal justice system? She does not hold any confidence in the integrity of the system. So if she is aware of the implicit message that the Supreme Court says her presence sends, maybe she does not want to be the vehicle for that message.

Again, that brings us to selective nullification. For violent crimes, for crimes with victims, there should be no nullification. If the juror is convinced beyond a reasonable doubt in such cases, then she should convict and be happy to do so. In my experience prosecuting cases for violent crimes, Washington, D.C. jurors are happy to put those people in prison. It is in everybody's interests to get those people off the streets, and certainly these jurors are acting in their self interests. In Chicago, for example, jurors know that nullified, violent African–American criminals are not going to move to the largely white communities of Bridgeport or Cicero; they are going to move to the predominantly black South Shore, they are going to move to the primarily African–American West Side. Thus, these jurors have no interest in emancipating violent African–American criminals. The problem is that separating violent criminals from their communities is not the main use of prisons. Most people are in prison for nonviolent conduct.

[As] for drug offenses, . . . I think that jurors in those cases should consider nullification. For possession cases, I encourage nullification. For distribution cases I do not encourage it, but I think it is an option that jurors should consider. Jurors should weigh factors that judges weigh now in the sentencing determination. For example, I would never encourage nullification for anyone who sells drugs to children. I might well suggest it for a nonviolent distributor of marijuana. There are two purposes of this selective nullification: black self-help, and, less importantly, political protest. The black self-help prevents people from being punished when there are better alternatives, as I discussed earlier.

The political protest part is to encourage an end to this madness of locking up African–Americans when white people do not get locked up for the identical crimes. Again, this is borne out by those drug statistics. According to the Justice Department, black people do not use drugs any more than whites—it is just that African–Americans get locked up more for drug charges. People ask what the black community would look like if drug offenders were not incarcerated. We know the answer to that: it would look like the white community. Again, the white community does not resort to the punishment regime for dealing with drug problems. I agree with that. I think punishment is not a smart way to deal with substance abuse. I think that when it comes to law enforcement, what is good enough for white people is good enough for African–Americans.

I hope that nullification would encourage rehabilitation for non-criminal means of dealing with the problem. I do not like drugs. I wish

people would not use them. I have seen them ruin people's lives. I might also add that I have seen alcohol ruin people's lives, but I also do not support locking up alcohol users and distributors. So I hope that nullification will spark the return of rehabilitation and crime prevention.

* * *

"Is American criminal justice just?" To me the answer is obviously not. There are too many African–Americans in prison who do not belong there. Do you really think that 50 percent of the most dangerous and immoral people in the United States are black? That is what our justice system tells us about black people. If you do not agree with that, if you do not believe that, then you must agree that we need fundamental change.

The second question is, "If not jury nullification, then what?" I do not want to hear that African–Americans should write to Congress. We tried that. It did not work. The house that African–Americans live in is on fire, and when your house is on fire, you do not write to Congress. You do not ask the people who set the fire to put it out; you leave the building. That is what my proposal for selective jury nullification encourages.

RACE–BASED JURY NULLIFICATION: REBUTTAL (PART A)

Andrew D. Leipold
30 J. Marshall L. Rev. 923 (1997)

* * * [D]o I think that the criminal justice system is perfect the way it is? Of course not. Do I think there are severe problems involving race and justice? Of course I do. Do I think the answer is selective jury nullification? Not even remotely.

Professor Butler says he does not want to hear us suggest that the answer is to write to Congress. That answer fails, he says, because right now the house is on fire, suggesting that more dramatic and more immediate action is needed. But even if the house is on fire, I do not think we should embrace a solution that involves fanning the flames and making the fire worse. This is what I fear selective race-based jury nullification will do.

Let me briefly outline a few of my concerns about Professor Butler's plan. The first two are technical, lawyer-type arguments. The last two address philosophical concerns I have about his proposal.

The first technical point involves the impact of Professor Butler's proposal on the makeup of juries. I agree with Paul entirely about the importance of African–Americans serving on juries. * * * It is critically important to have juries that are reflective of community sentiments and community norms. Given this, we should ask ourselves what juries will look like if large numbers of African–American potential jurors were to embrace the Butler plan. I think the answer, without a doubt, is that there would be fewer African–Americans seated on juries than there are today. * * *

If potential African–American jurors were to embrace the Butler plan, and if they were honest during voir dire, their belief in jury nullification would at least give prosecutors a race-neutral explanation for removing these jurors with their peremptory strikes. In addition, if the jurors were candid in admitting that they came to the jury box with a very strong presumption of acquitting a defendant regardless of what the facts show, such jurors could almost certainly be removed for cause. Since there are no limits on the number of challenges for cause, every African–American juror who believed in race-based nullification might be excused in certain cases. The result would inevitably be juries that are less diverse; this surely can not be part of the solution that Professor Butler seeks.

My second technical argument is that juries are incapable of making reasoned nullification decisions, because at trial they will not be given the information they need. At the heart of Professor Butler's plan is the notion that juries should engage in a cost-benefit analysis when deciding whether to convict. Jurors are supposed to look at the defendant and ask, "Even if this defendant committed the crime charged, what are the rewards of keeping this person out of jail, and what are the risks to the community of letting this person stay free?" The problem is that juries will never hear the evidence that would help them answer this question.

Consider the problem in the context of a simple drug possession case. If we were sitting on a jury, what would we like to know about the defendant before we decided whether to nullify his conviction? We would probably want to know whether the defendant is contrite. We would want to know whether he had a criminal record, and if so, how serious were his prior crimes. We might want to know whether there was anyone else involved in the crime who is more blameworthy. We might wonder how the prosecution enforces this crime against others: are African–Americans disproportionately targeted or arrested for this type of crime? We might also want to know about the potential sentences the defendant would face if convicted; under our cost-benefit analysis, we might be more willing to nullify if the defendant faced a stiff, mandatory sentence.

The problem is that almost none of this information is admissible at trial. Defendants cannot be forced to testify, so the jurors will often be unable to evaluate the defendant's contrition. Evidence of prior crimes is usually inadmissible, as is information on possible sentences or the prosecution's enforcement scheme. In short, through no fault of their own, jurors just will not be able to engage in a meaningful cost-benefit analysis. The best they would be able to do is speculate, based on what they think might be going on, rather than on what is actually going on in the case at hand. * * *

There are undoubtedly other groups that will feel that they, too, do not get a fair shake from the criminal justice system and they, too, should come to the jury box with an eye toward nullifying the convictions of members of their groups. "What's so bad about that," you ask? "Maybe that's the way all juries should decide cases. The problem with nullifica-

tion is that once we tell a jury, directly or indirectly, that it is okay to engage in an uninformed cost-benefit analysis, we have no moral basis for complaining about any decision that a jury makes.

Assume that a jury nullifies in the case of a young African–American defendant who has been charged with simple possession. Maybe this is a good result: maybe in that specific case, society is better off keeping another African–American kid out of jail, away from a very harsh sentence. But now assume that the next jury comes back and says, "Yes, we think this defendant battered his wife, but you know, she decided to stay in the marriage rather than get a divorce, it looks like she provoked him by spending too much time at her job, she was nagging him, et cetera, and we are not going to send this guy to jail." When a jury recently acquitted a defendant who had raped a woman at knife point because the woman was "asking for it" by dressing in a provocative manner, this also sounded like a cost-benefit analysis. We might be repelled by this reasoning, but we do not have any standing to complain about the process by which the outcome was reached. Those juries also engaged in a cost-benefit analysis, the same process approved of by the Butler plan. * * *

The final concern I have is at the broadest philosophical level. It is a comment that makes me very sad to have to raise at all: whether you go to jail or get set free should not depend on the color of your skin. Using race as the reason for acquitting or convicting is a bad idea, and no matter how strategic the reasoning and no matter how good our intentions, it is still wrong. It is wrong because it encourages the kind of stereotyping that had led to problems in the first place. It is wrong because we are telling people that they will never get equal justice in the courts and so you should take whatever you can get, however you can get it, and be satisfied with that. In short, the plan raises the flag of surrender in the fight for equal justice under the law.

NOTE

The constitutions of Indiana, Maryland, and Georgia contain provisions which empower the jury to determine both law and fact, but courts have limited the application of these provisions. The Indiana Constitution provides that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts[,]" but it has been held that "that right is not without limitation[ ] . . . [and the jury] may not arbitrarily reject the instructions of the court." Fuquay v. Indiana, 583 N.E.2d 154, 156 (Ind. Ct. App. 1991). Maryland's constitution states that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact," but the Fourth Circuit Court of Appeals has indicated that juries in criminal cases are not given unrestricted powers in applying the law, and in fact, "[t]he powers of the jury are hedged in a number of ways." Wyley v. Warden, Maryland Penitentiary, 372 F.2d 742, 743–44 (4th Cir. 1967). The Georgia Constitution provides that "[i]n criminal cases . . . the jury shall be the judges of the law and the facts." Yet, "it has long been settled that this language . . . means that jurors are

'made absolutely and exclusively judges of the facts in the case [and] they are, in this sense only, judges of the law.' " Hall v. State, 201 Ga.App. 133, 410 S.E.2d 448, 451 (Ct. App. 1991) (quoting Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940)).

Occasional proposals have been made to systematically inform juries of their power to nullify. For example, in 1990 Oregon voters rejected an initiative measure that would have required judges in criminal trials to instruct juries with the following language:

> If you decide that the prosecution has proven beyond reasonable doubt every element of the criminal charge but * * * you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict which you believe is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which the defendant has been charged and the wisdom of applying that law to the defendant. * * * The court cautions that with the exercise of this right comes the full moral responsibility for the verdict you bring in.

See Fauvre v. Roberts, 309 Or. 691, 791 P.2d 128 (1990). Would you have voted for this law?

F. STATUTORY INTERPRETATION

As we have seen, the primary source of criminal law in the United States is statutory law. No statute, however, is self-interpreting, and judges play an important role in deciding what a particular statute means and how it should apply to particular cases. Whether the jurisdiction is one whose penal code is based on the common law of England or one whose penal code has incorporated the Model Penal Code in whole or in part, judges must develop ways to interpret statutes to serve a number of goals. These goals include respecting the "plain language" of the statutory text; discerning and effectuating the intent of the legislature or, in the case of an initiative, the voters; and making sure that the interpretation of a particular statute in one case does not contradict its interpretation in another case.

Judges in England and the United States have developed a body of informal rules over time to help them interpret statutes. Some of these rules address what values a judge should prioritize when reading a statute: for example, the rule that the interpreter should always begin with the text of the statute itself. Other rules concern efficiency in the administration of justice: for example, the rule that statutes should be interpreted in such a way as to avoid constitutional problems. Still other rules address grammar and syntax issues that frequently arise in textual interpretation. Two of these—*noscitur a sociis* and *ejusdem generis*—are described in the case that follows. Finally, some rules of statutory interpretation, such as the "rule of lenity" also discussed in the following case, reflect basic principles of fairness: under the rule of lenity, all doubts

when reading a criminal statute should be resolved in favor of the defendant, in recognition of the important liberty interests at stake and the presumption of innocence. Collectively, these various sorts of interpretive rules are referred to as "canons of statutory construction."

This alternative term for statutory interpretation—"statutory construction"—reminds us that the process of interpretation is as much an art as a science. Although judges are supposed to apply the law and not make it, when statutory language is broad, ambiguous, or outdated, the line between applying and making can become exceedingly fine. Indeed, as students of literary interpretation know, to read a text is always in some sense to "construct" its meaning. In Chapter 2, we will explore some of the constitutional implications of the fuzzy boundary between discovering and making meaning.

UNITED STATES v. DAURAY

United States Court of Appeals for the Second Circuit
215 F.3d 257 (2d Cir. 2000)

JACOBS, CIRCUIT JUDGE:

Defendant-appellant Charles Dauray was arrested in possession of pictures (or photocopies of pictures) cut from one or more magazines. He was convicted following a jury trial in the United States District Court for the District of Connecticut of violating 18 U.S.C. § 2252(a)(4)(B), which punishes the possession of (inter alia) "matter," three or more in number, "which contain any visual depiction" of minors engaging in sexually explicit conduct. On appeal from the judgment of conviction, Dauray argues that the wording of § 2252(a)(4)(B)—which has since been amended—is ambiguous as applied to possession of three or more pictures, and that the rule of lenity should therefore apply to resolve this ambiguity in his favor. We agree, reverse the conviction, and direct that the indictment be dismissed.

BACKGROUND

On May 13, 1994, an officer of the Connecticut Department of Environmental Protection approached Dauray's car in a state park and found Dauray in possession of thirteen unbound pictures of minors. The pictures were pieces of magazine pages and photocopies of those pages. On November 18, 1998, a federal grand jury returned a one-count indictment, charging Dauray with possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The version of the statute then in force punished the possession of "3 or more books, magazines, periodicals, films, video tapes, or other matter" that have passed in interstate or foreign commerce and "which contain any visual depiction" showing (or produced by using) a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a)(4)(B) (1994) (amended 1998). The statute defined "sexually explicit conduct" in part as "actual or simulated—lascivious exhibition of the genitals or pubic area of any person."

Dauray and the government stipulated at trial to the facts that bear upon this appeal. One stipulation provided that "[i] on or about May 13, 1994, Charles Dauray possessed the visual depictions which have been introduced into evidence; and [ii] Charles Dauray was aware of the contents of these visual depictions and thus he knew that genitalia of minors appear in each of them." A second stipulation was that the visual depictions were transported in interstate commerce. The jury therefore had only to decide whether the visual depictions showed "minor[s] engaging in sexually explicit conduct," i.e., whether they depicted the "lascivious exhibition of the genitals or pubic area." The jury found Dauray guilty, and by special interrogatory specified the four of the thirteen pieces of evidence that met the statutory definition.

The district court then considered Dauray's pretrial motion, on which the court had earlier reserved decision, to dismiss the indictment for failure to charge an offense. Dauray argued that each of the four pictures specified by the jury was in itself a "visual depiction" and therefore could not be "other matter which contain any visual depiction." Therefore, he reasoned, the indictment failed to charge an offense. The district court concluded that the pictures Dauray possessed were "other matter" within the plain meaning of § 2252(a)(4)(B), and for the same reason denied Dauray's request to apply the rule of lenity.

Dauray was sentenced on April 30, 1999 to 36 months of imprisonment, followed by three years of supervised release, and a $50 special assessment.

DISCUSSION

The statute under which Dauray was convicted has since been amended. At the time, the statute provided in pertinent part:

> (a) Any person who—
>
> (4) . . .
>
> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (ii) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(4)(B) (1994) (emphasis added).

The question presented on appeal is whether individual pictures are "other matter which contain any visual depiction" within the meaning of

§ 2252(a)(4)(B). This question of first impression is one of law, which we review de novo.

Notwithstanding diligent efforts to construe § 2252(a)(4)(B), we conclude that it can be read either to support or to defeat this indictment. We therefore apply the rule of lenity to resolve the ambiguity in Dauray's favor.

I.

A. Plain Meaning.

Our starting point in statutory interpretation is the statute's plain meaning, if it has one. Congress provided no definition of the terms "other matter" or "contain." We therefore consider the ordinary, common-sense meaning of the words.

Among the several dictionary definitions of the verb "to contain," Dauray presses one, and the government emphasizes another. (i) "To contain" means "to have within: hold." Webster's Third New International Dictionary 491 (unabridged ed.1981). Dauray argues that a picture is not a thing that contains itself. Thus in the natural meaning of the word, a pictorial magazine "contains" pictures, but it is at best redundant to say that a picture "contains" a picture. (ii) "To contain" also means "to consist of wholly or in part: comprise; include," *id.*, and the government argues that each underlying piece of paper is "matter" (as opposed perhaps to anti-matter) that contains the picture printed on it. It is also possible, applying this latter meaning, to say that each picture, composed of paper and ink, is matter that contains its imagery.

The district court assumed that Congress meant to employ both meanings. The district court thus recognized that one critical word of the statute lends itself to (at least) two meanings, only one of which can sustain the conviction, but then assumed, without resort to tools of construction, that the statutory language was drafted to support every meaning that would impose punishment. Resort to tools of construction is necessary in this case, however, to decide whether the language used gave adequate notice that this defendant's conduct was forbidden by this statute.

The plain meaning of another critical term—"other matter"—is also elusive. The dictionary defines "matter" as "the substance of which a physical object is composed." Webster's Third New International Dictionary 1394. Everything is more or less organized matter (as Napoleon observed). But Congress employed "matter" in a specific context, as the final, general term at the end of a list. We must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.' " Other courts have construed "other matter" in § 2252(a)(4)(B) as "simply something which, at a minimum, must be capable of containing a visual depiction." These definitions are unhelpful for our purposes.

There is no doubt that a pictorial magazine is "matter" that "contains" visual images. But no court that has construed § 2252(a)(4)(B) has considered whether a loose photograph clipped from such a magazine is itself "matter" that "contains" a visual image. The First Circuit recently held that a single negative film strip containing three images constituted only one piece of "matter" under § 2252(a)(4)(B). The court noted that "[h]ad Congress meant for the number of images to be the relevant criterion, it would have likely stated as much." The case concerned the character of singular "matter" containing multiple images, not whether each image—if loosed from the container—could itself constitute prohibited "matter."

Every other case that construes the term "other matter" has involved whether an individual computer graphics file is a "matter." These cases consider whether a computer file has the capacity to "contain a visual depiction," whether the general term "other matter" extends the statute's prohibition to a medium that is unenumerated in the list (and unlikely to have been thought of when the statute was drafted), and whether the proper analog to a graphics file is a page in a book or a book in a library. These cases have no evident bearing on whether a single magazine (which it was no crime to possess at the time of Dauray's arrest, no matter how many pages and pictures it contained) can become prohibited material simply by detaching the staples that bind the pages. * * *

B. Canons of Construction.

Because the government and Dauray each rely on a reasonable meaning of § 2252(a)(4)(B), we resort to the canons of statutory interpretation to help resolve the ambiguity.

1. Lists and Other Associated Terms. Two related canons inform our analysis of the meaning of "other matter." First, the meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases (*noscitur a sociis*). Second, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated" (*ejusdem generis*). In this case, "other matter" should be construed to complete the class of items or things in the list preceding it, namely "books, magazines, periodicals, films, [or] video tapes."

Dauray argues that the listed items form a category of picture containers that can enclose within them multiple visual depictions. Because a picture taken from a magazine is not itself a picture container, like books or magazines, but is rather a thing abstracted from its container, Dauray contends that a picture in itself cannot be considered "other matter" within the meaning of the statute, and that possession of three of them is not prohibited.

But these canons equally support the government's argument. The list—at a sufficient level of generality, and completed by the catch-all

"other matter"—can be read to include any physical medium or method capable of presenting visual depictions. A picture cut from a magazine, considered as paper and ink employed to exhibit images, can be said to contain an image or as many images as can be perceived in a picture or photograph, which depends on how one looks at it.

2. Statutory Structure. "[A] statute is to be considered in all its parts when construing any one of them." The Protection of Children Against Sexual Exploitation Act contains four substantive subsections (of which § 2252(a)(4) is one): § 2252(a)(1) prohibits the interstate transportation of child pornography; § 2252(a)(2) prohibits the receipt or distribution of it; and § 2252(a)(3) prohibits its sale or possession with intent to sell. Only § 2252(a)(4) specifies that the conduct forbidden involves "books, magazines, periodicals, films, video tapes or other matter which contain" the pornography. The others more simply forbid "any visual depiction" of child pornography, period. Dauray and the government both find support in this statutory structure.

According to Dauray, the different drafting demonstrates that Congress knew how to prohibit the possession of individual pictures if it wanted to do so. The plain language of the other sections—each of which targets "any visual depiction"—is such that if Dauray had transported, distributed or sold the pictures he merely possessed, he would have violated the law unambiguously.

But the government could argue: that the transport, distribution and sale of child pornography are most harmful to children, and were therefore prohibited regardless of the medium or number of visual depictions; that Congress did not want to cast so fine a net in the context of mere possession in order to assure that the accidental possessor of one piece of pornography avoids liability while the collector does not; and that Congress implemented the distinction by punishing only persons who possess a threshold number (three) of anything that contains pornographic images, i.e., "books, magazines, periodicals, films, video tapes or other matter." If the statute simply read "3 or more visual depictions," then the accidental possession of one pictorial magazine could violate the statute. The difference between the language in § 2252(a)(4) and the other subsections is therefore (according to this view) fully consistent with a congressional intent to punish the possession of three or more individual pictures, postcards, posters, still frames, or even fragments of magazine pages.

3. Statutory Amendment. A statute should be construed to be consistent with subsequent statutory amendments. In 1998, Congress amended the statute by replacing "3 or more" with "1 or more" of the same list of "books, magazines, periodicals, films, video tapes or other matter." At the same time, Congress established an affirmative defense for a defendant who could show that he possessed "less than three matters containing" child pornography and "promptly and in good faith ... took reasonable steps to destroy" the pornography or report it to law enforcement officials without disseminating it to others. According to the government, the list,

with its catch-all of "other matter," is designed to reach even an individual photograph. That could have been accomplished without the list, however, by an amendment that simply prohibits possession of "1 or more visual depictions." Dauray argues with some force that the list is superfluous post-amendment unless it serves to distinguish a "container" such as a magazine, from its contents, such as individual pictures cut from the magazine's pages. The government on this appeal makes no response to this argument, which is not to say that no response can be made.

4. Avoiding Absurdity. A statute should be interpreted in a way that avoids absurd results. Whichever interpretation one accepts, the statute tends to produce absurd results. Dauray's reading would prohibit the possession of three books, each of which contains one image, but allow the possession of stacks of unbound photographs. Equally absurd, the government's reading would prohibit the possession of three individual photographs (unless they were mounted in a single album), but allow the possession of two thick illustrated tomes.

C. Legislative History.

When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history. Unfortunately, "[e]xamination of [§ 2252's] legislative history ... reveals no insight as to what Congress intended the precise scope of 'other matter' to be." * * *

II.

Due process requires that a criminal statute "give fair warning of the conduct that it makes a crime." "[B]efore a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." The rule of lenity springs from this fair warning requirement. "In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant's favor." This expedient "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."

But "[b]ecause the meaning of language is inherently contextual," the Supreme Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government." "Instead, [the Court has] always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." It is a "doctrine of last resort."

Here, we have done what we can. We have read the plain language of § 2252(a)(4)(B), considered the traditional canons of statutory construction, looked for legislative history, and canvassed potentially relevant case

law. And we are left with no more than a guess as to the proper meaning of the ambiguous language here.

While it is true that "our role as a court is to apply the provision as written, not as we would write it," the statute's ambiguity makes it impossible for us to apply the provision in this case without simply guessing about congressional intent. Indeed, the government conceded at oral argument that Dauray would not have violated the statute had his pictures been found in a photo album rather than in an unbound stack.

The government did not show that the pictures at issue were taken from more than a single magazine. At the time of Dauray's arrest, the statute did not forbid possession of such a magazine. Nor did the statute give Dauray notice that removing several pictures from the magazine, and keeping them, would subject him to criminal penalties. This result is unconstitutionally surprising. Under these circumstances, we must apply the rule of lenity and resolve the ambiguity in Dauray's favor.

CONCLUSION

For the foregoing reasons, the judgment is hereby reversed.

KATZMANN, CIRCUIT JUDGE, dissenting.

I respectfully dissent from the majority's well-argued opinion. I would not apply the rule of lenity in this case. In *Muscarello v. U.S.*, the Supreme Court stated that the "simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." The Court continued: "To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." I do not think that there is such a "grievous ambiguity or uncertainty" in the statute before us, or that we can make "no more than a guess as to what Congress intended." The statute requires that the visual depiction be contained within books, magazines, periodicals, films, video tapes, or other matter. The word "contain" in the statute, consistent with its purposes, could mean both "comprise" and "hold" and still, in my view, not lead to "grievous ambiguity or uncertainty." Nothing in the statute itself or in the legislative record suggests that Congress did not intend to use both ordinary meanings of the word "contain." It makes sense, given the statute's purposes, that a photograph could be understood—quite naturally—to "contain" a visual depiction.

I fully agree with the majority that the statute could result in some incongruous interpretations. But in the end, I conclude that we must "apply the provision as written, not as we would write it."